(24,796)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 513.

AUGUST BAY, PLAINTIFF IN ERROR,

vs.

MERRILL & RING LOGGING COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 31, 1916.

a United States Circuit Court of Appeals for the Ninth Circuit.

No. 2447.

AUGUST BAY, Plaintiff in Error,
v.
MERRILL & RING LOGGING COMPANY, a Corporation, Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received and Filed July 18, 1914.
(Signed) F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

1 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2439.

AUGUST BAY, Plaintiff,
vs.
MERRILL & RING LOGGING CO., a Corporation, Defendant.

Names and Addresses of Counsel.

John T. Casey, Esq., Attorney for Plaintiff in Error, 450 New York Building, Seattle, Washington.
E. C. Hughes, Esq., Attorney for Defendant in Error, 661 Colman Building, Seattle, Washington.
Maurice McMicken, Esq., Attorney for Defendant in Error, 661 Colman Building, Seattle, Washington.
Wm. T. Dovell, Esq., Attorney for Defendant in Error, 661 Colman Building, Seattle, Washington.
H. J. Ramsey, Esq., Attorney for Defendant in Error, 661 Colman Building, Seattle, Washington.
[*1]

[*Page number of original certified typewritten Transcript of Record.]

[Title of Court and Cause.]

Complaint.

Plaintiff complains of the defendant and for cause of action alleges:

I.

That prior to the 21st day of October, 1912, the Plaintiff was a strong healthy young man of the age of twenty-eight (28) years and earning and able to earn from Three ($3.00) to Five ($5.00) Dollars per day at logging in the woods and at other kinds and classes of labor.

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II.

That at said time the defendant was a domestic corporation and owned, controlled and operated a logging camp or camps, and also a railroad in King and Snohomish Counties in the State of Washington, and said railroad of the defendant is connected with other railroads including Interstate Railroads and Carriers, and the said defendant is and at all times hereinafter was, engaged in transporting and shipping logs and lumber and other freight over and along its said railroad in connection with said other interstate railroads and carriers, and the said defendant is, and at all times hereinafter was, engaged in the carriage and shipment of Interstate and Foreign Commerce and the defendant is now, and at all times hereinafter was engaged in Interstate and Foreign Commerce, and the Plaintiff at the time he was injured as hereinafter stated and alleged, was in the employ of the defendant and was engaged in such Interstate and Foreign commerce for the defendant.

III.

That on said 21st day of October, 1912, and while the plaintiff was engaged in loading logs on the cars of the defendant, and while plaintiff was working at the side of the cars and railroad track of the defendant, the defendant carelessly and negligently, caused and allowed a log to be swung over and near plaintiff by a derrick flying machine and steam skidder and without any notice or warning to plaintiff, and without giving or allowing plaintiff any time to get out of the way or to a place of safety, the defendant through its servants and agents, caused and allowed a log to be quickly lowered and dropped down on top of and against plaintiff's left leg, while he was at his work, and without giving the plaintiff any chance to escape to a place of safety, plaintiff's said leg was [2] *was*

3 caught between said log and the end of one of the railroad ties on defendant's railroad, and plaintiff's said leg was crushed and injured as hereinafter more fully described.

IV.

That plaintiff's said leg was bruised, and the flesh and bones and muscles and tendons therein were mutilated, mashed, torn and destroyed, so that plaintiff was obliged to go to the hospital, and one week later and on the 28th day of October, 1912, plaintiff was obliged to have his said leg amputated, which caused him great pain, suffering and humiliation of both mind and body, and plaintiff will be a cripple as long as he lives and plaintiff has been damaged in the sum of thirty thousand ($30,000.00) Dollars through the negligence of the defendant as aforesaid.

V.

That as a part of said damages plaintiff has lost all of his wages up to the present time and will never again be able to earn any wages to speak of again and plaintiff has been caused large expense for hospital, doctors and nurses ever since said 21st day of October, 1912, and the plaintiff will necessarily incur large expense in the future for such costs and expenses and charges which can not at this time be more particularly set out or described.

VI.

That all of the said injuries to plaintiff resulted entirely through the fault, carelessness and negligence of the defendant and through the fault, carelessness and negligence of its servants, agents and employees for which defendant is responsible and not through any act, deed, omission or fault on the part of the plaintiff and plaintiff is seeking to recover the aforesaid damages and asks the benefit of the Federal Employers' Liability Act approved April 22nd, 1908, being an Act relating to the liability of Interstate Railway Carriers with their employees and all other laws passed by Congress or otherwise bearing upon relations of master and servant.

Wherefore plaintiff asks for judgment against the defendant for the said sum of Thirty Thousand ($30,000.00) Dollars — for his costs and disbursements herein.

JOHN T. CASEY,
Attorney for Plaintiff.

[Verification.] [3]

[Indorsed: Complaint. Filed Mar. 31, 1913.] [4]

[Title of Court and Cause.]

Amended Answer.

Comes now the defendant, Merrill & Ring Logging Company, and by leave of the Court files herein its amended answer to plaintiff's complaint, and avers:

I.

That it denies any knowledge or information sufficient to form a belief as to each and every of the allegations of paragraph I of said complaint, except that it admits that said plaintiff was at and prior to the time mentioned in said paragraph I receiving the daily wage of $3.50 per day.

II.

Answering paragraph II this defendant admits that it was and is a domestic corporation, organized and existing under the laws of the State of Washington, that it owned, controlled and operated a logging camp or camps and also a logging railroad in Snohomish County in said State, and that it was at all the times mentioned in said complaint engaged in transporting logs over its said logging road to the waters of Puget Sound, and that the plaintiff was at said times in the employment of this defendant; but the defendant denies each and every of the [5] remaining allegations of said paragraph II.

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III.

Answering paragraph III defendant admits that on the said 21st day of October, 1912, plaintiff was engaged in loading logs on the cars of the defendant, and while working at the side of said cars and railroad track his leg was struck by a log then being loaded and injured thereby; but defendant denies each and every of the remaining allegations of said paragraph III.

IV.

That as to each and every of the allegations of paragraph IV of said complaint this defendant denies any knowledge or information sufficient to form a belief, and denies that plaintiff has been damaged in the sum of Thirty Thousand Dollars ($30,000.00), or any other sum.

V.

Defendant denies any knowledge or information sufficient to form a belief as to each and every of the allegations of paragraph V.

VI.

Defendant denies each and every allegation of paragraph VI of said complaint, and denies that plaintiff is entitled to the benefit of the Act of Congress of the United States, approved April 22, 1908, being an Act Relating to the Liability of Common Carriers to Its Employes, and denies that this Court has any jurisdiction of the parties to this action, or the subject matter hereof.

Further answering, and as a first affirmative defense, this defendant avers: [6]

I.

That it is a corporation organized and existing under the laws of the State of Washington, and that it owns and operates a
6 logging railroad in the County of Snohomish in said State; that defendant has complied with all the requirements of Chapter 74 of the Session Laws of 1911 of the State of Washington, being an Act Relating to the Compensation of Injured Workmen, and has since the enactment of said law regularly paid all its premiums to the State, in accordance with the schedule of contribution as provided in said Act.

II.

That this plaintiff has duly applied for and has regularly received compensation under and in pursuance of the terms of said Act out of the funds provided thereby, and for which the aforesaid premiums of this defendant were contributed and paid.

III.

That by the terms of said Act all civil actions and causes of action for such personal injuries as are described in plaintiff's complaint, and all jurisdiction of all courts of the State over such causes were abolished.

IV.

That defendant avers that plaintiff is now estopped to prosecute this action or to claim that defendant is, or has at any time been engaged as an interstate carrier by railroad, or that the plaintiff was at the time of his employment engaged in such service, or that the Act of Congress approved April 22, 1908, relating to the liability of a common carrier to its employes, has any application to the defendant herein. [7]

Wherefore, defendant prays that plaintiff's action be dismissed herewith.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant.

[Verification.]

[Served June 14, 1913.]
[Indorsed: Filed June 16, 1913.] [9]

7 [Title of Court and Cause.]

Judgment of Dismissal.

The above entitled cause coming on regularly for hearing before the Court, the plaintiff appeared by his attorney John T. Casey, and the defendant appeared by its attorneys Hughes, McMicken, Dovell & Ramsey; thereupon a jury was impaneled and sworn to try said cause and the plaintiff having introduced his proof and rested and the defendant not introducing any proof rested also, the defendant

did thereupon interpose a challenge to the sufficiency of the evidence in the cause and did move the Court to direct that a verdict and judgment be entered in favor of the defendant, which said motion was based upon the following grounds, to-wit:

First. That the testimony in the case did not establish that the defendant was a common carrier by rail. Second. That it was not engaged as a common carrier in interstate commerce. Third. That it did not establish that the plaintiff was at the time of his injury engaged in the service of a common carrier by rail in interstate commerce; and that the court had no jurisdiction of the subject matter or of the parties. [10]

And the Court having heard the argument of counsel and having heard and considered all the evidence in the cause, and being convinced that there was an entire failure of proof on the part of the plaintiff upon the allegations of his complaint, did thereupon withdraw said cause from the jury and did order that judgment of dismissal on the merits of said cause be entered.

Wherefore, it is now ordered and adjudged by the Court
8 that plaintiff's cause be and it is hereby dismissed upon the merits, and that the defendant have and recover its costs and disbursements herein to be taxed, to which ruling, order and judgment of the Court the plaintiff at the time excepted and his exception was allowed.

Done in open court this the 4 day of October 1913.

JEREMIAH NETERER, *Judge.*

O. K. as to form.
JOHN T. CASEY.

Approved:
HUGHES, McMICKEN, DOVELL & RAMSEY.

[Indorsed: Judgment of Dismissal. Filed Oct. 4, 1913.]

[Title of Court and Cause.]

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the annexed bill of exceptions may be filed and certified by the Court as the bill of exceptions in this cause.

Dated: June 15, 1914.

JOHN T. CASEY, *Attorneys for Plaintiff.*
HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant. [12]

[Title of Court and Cause.]

Bill of Exceptions.

Be it remembered, That heretofore, to-wit, on the 2nd day of October, 1913, the above entitled cause came on regularly for trial

in the above named Court, before the Honorable Jeremiah Neterer, Judge of said Court, sitting with a jury, the plaintiff appearing by John T. Casey, Esquire, and Dudley G. Wooten, Esquire, his
9 attorneys and counsel, and the defendant appearing by E. C. Hughes, Esquire, of Messrs. Hughes, McMicken, Dovell & Ramsey, its attorneys and counsel, and the following proceedings were had, to-wit:

A jury having been duly empaneled and sworn to try the cause, the plaintiff to sustain the issues on his part introduced and offered in evidence the following testimony, to-wit:

TIMOTHY JEROME called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

(By Mr. Casey:)

I am Secretary of the Merrill & Ring Logging Company [13], the defendant in this case. That company has been engaged in operations under the articles of incorporation, a copy of which is here in evidence, marked Plaintiff's Exhibit "A." They have a standard gauge logging railroad there, having switching connections with the Everett-Seattle Interurban Railway line and also with the Great Northern Railway line. The railroad comes down a canyon, passing by trestle over the Great Northern tracks out onto the dock, and dumps the logs into Puget Sound. We take out on an average of 200,000 feet a day; that is in the neighborhood of about 38 or 40 cars a day.

Cross-examination.

(By Mr. Hughes:)

We are engaged only in logging our own timber. All the logs carried down over this logging road and dumped into the Sound are our own logs. We have never been engaged in hauling logs for others, though once, several years ago, we logged some land for the Mukilteo Lumber Company, and, necessarily, under our contract, hauled those logs down to the water. We cut the logs and delivered them in the Sound at so much per thousand; the hauling was a part of the logging. We have never made use of that rail-
10 road except for hauling logs cut by our own company. The only time we have ever carried freight for anyone else was the time when as a matter of accommodation to the Interurban road we hauled a few cars of steel up for them when they were building the Interurban, and they started in the center and had no connection either at the Everett or Seattle end, and we hauled a few cars of steel for them, with the understanding [14] that they were to assume all risks and pay all damages on account of any accident there might be on our line at that time. There was an accident, resulting damages from which were paid by them. I think the steel in that shipment came from Seattle over the Great Northern and was then taken to the Interurban on our line. The road comes down

from the land we are logging at quite an incline, and when we start to cross the Great Northern tracks our road swings around over a trestle, and then to cut down to the Great Northern track there is a separate sidetrack which swings down through the ravine to the Great Northern track. The grade of this sidetrack connection down to the Great Northern is about an eight per cent. grade.

With the exception of steel for the Interurban, heretofore mentioned, we have never carried anything except our own supplies. The switching connection with the Great Northern is for the purpose of getting supplies which come by the Great Northern or over the Interurban to our camp.

We do not manufacture any of the logs which we carry down and dump into the Sound, nor are those logs under any contract by our company to be sold for continuous foreign shipment. We sell them at our boom, and when the tugs take hold of the rafts of logs at our boom they are the other fellows'. We do not have anything further to do with them. They are sold and paid for by the
11 purchasers there at the boom, and if there is any loss in the logs being towed away from our boom, it is the loss of the purchasers and not ourselves. We have absolutely nothing to do with them after they leave our boom. [15]

Redirect examination.

(By Mr. Casey:)

We sell the logs to different mills upon the Sound; most of them to the Everett mills and the mills in that vicinity—the Weyerhausers, Crown and Canyon. We don't know anything about what the Weyerhauser or Crown mills do with their manufactured lumber. I should not think there would be much market in the immediate vicinity of those mills, save in Everett perhaps. I don't know what they do with the great bulk of their lumber. I have seen their lumber at the railroad tracks. I would think they ship some of it by ships and some by rail, though I have noticed the Weyerhauser mill doing some carting about town. The great bulk of it goes away from the mill, but I don't know whether it goes out of the state. That includes the logs they buy from us. We charged the Interurban for the hauling we did for them. I don't know what a common carrier would have charged, but my recollection is we simply charged what it had cost us to operate our locomotive for the time it would take to haul the cars up; it simply covered the cost. The hauling of the logs for the Mukilteo mill was a part of the regular logging contract, in which the carriage of those logs over our railroad was figured into the cost. There were approximately 50,000,000 feet of timber logged under that contract.

Recross-examination.

(By Mr. Hughes:)

Our arrangement with the Mukilteo or Crown Lumber Company was to do all the cutting of their timber into logs, and the loading,

hauling and delivery of those logs into Puget Sound for so
12 much a thousand. Our logging road at the [16] time ran up beyond that timber of theirs into our own timber.

Redirect examination.

(By Mr. Casey:)

The logs, poles and piling where they are dumped into the Sound are not within reach of ship's tackle; tugs take them away. I doubt if a ship could get in there. (Admission by Counsel for Defendant).

The Merrills and Rings are families who own and hold in the name of corporations timber lands in British Columbia and in Clallam, Jefferson and Snohomish counties. The timber lands in Snohomish County and the logging road are held and owned by a corporation known as the Merrill & Ring Logging Company, and all the stock, except a limited amount, which is owned by some of the men who have been long in their employ, is owned by the Merrill & Ring Lumber Company. The Merrill & Ring Lumber Company is a holding corporation and holds the stock of the Merrill & Ring Logging Company as well as other companies. It does no operating business whatever, nor do they in any of their relations engage in the manufacturing business. The Merrill & Ring Logging Company is the only operating concern.

ROBERT B. ALLEN called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows: [17]

Direct examination.

(By Mr. Casey:)

I am editor of the West Coast Lumber Journal, and am familiar with the government reports of the amount of lumber cut in the State of Washington during the year 1912, which was four billion ninety-nine million feet, as shown by government figures. The amount shipped out of the state by both rail and water is about 80%.

13 ALBERT MILLER, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

(By Mr. Casey:)

I worked as a brakeman on the logging railroads and boom man on the Sound for the defendant in this case, and am familiar with the trackage facilities and connections they have with other railroads. While I was working up there boats landed at the Sound terminus of the railroad which carried freight and passengers. We unloaded some freight from that boat which did not have the name of Merrill & Ring on it but some other name. There was no other camp there besides the Merrill & Ring camp. The logs and poles were brought down from the woods in cars and thrown into the

Sound; then they were rafted up, sold to different parties, sent to Everett and Mukilteo, and so on. I have occasionally passed the Weyerhauser and Everett mills and have seen quite a bit of the lumber from those mills going away by rail and some by steamship. One of the freight cars that I saw upon this line was loaded with short wood and one with slabs. I think at one time they had a boxcar loaded with castings, such as brake [18] heads, brake shoes and brake wheels. Some of the boats I saw loading lumber at the mills were flying foreign flags, but I cannot say where the logs went that I helped unload where I was working.

Cross-examination.

(By Mr. Hughes:)

All the logs I ever saw were hauled down from the main camp and dumped into the boom in the Sound. At times when the tide is low there is hardly enough water in the boom to float the logs. Tug boats come there, take the rafts and tow them away, and that is the only way I ever saw logs taken away from there. I think some of the supplies that were left at the dock by the little
14 boat that comes from Everett were for the use of the Merrill & Ring Lumber Company, though I remember we made frequent stops at a platform a mile and a quarter this side of a camp there and unloaded supplies. I don't know—I cannot say whether or not the supplies which were left on this platform were for the grading crew of the Merrill & Ring Lumber Company. I know the box had a different name. I don't know if the man was a jobber. I don't know who used them. The oil was used by the Company in its engines, which are oil burners. The spur track which runs down from the trestle to the Great Northern has a pretty stiff grade. The cars hauled up over this grade from the Great Northern contained supplies for the use of the Merritt & Ring Logging Company and never contained anything else, so far as I knew, and were taken back empty to the Great Northern tracks. The oil was all used by the Merrill & Ring Logging Company in its business. The wood and slabs that were hauled up were used in the boilers of the Merrill & Ring Lumber [19] Company, or by families living in the immediate vicinity. I don't know whether those were the families of employes of the Merrill & Ring Lumber Company or not, nor do I know whether any charge was ever made.

Redirect examination.

(By Mr. Wooten:)

While I was there almost everything that passed over the road was logs, not piling or telegraph poles, though I think at one time there was some piling or poles, though they might have been for use as boom sticks. The logging road was a standard guage road. Some of the rolling stock used belonged to the defendant and some did not. The logs were hauled on Merrill & Ring Company's own cars. During the time I was there I never saw any logs shipped

out by the Great Northern; they were all dumped into the boom.

15 DAVID EDWARD ALLEN called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination. (By Mr. Casey.)
Cross-examination. (Mr. Hughes.)

NOTE.—Testimony concerns only events connected with the injury. [20]

AUGUST BAY, the Plaintiff, being first duly sworn, testified on his own behalf as follows:

Direct examination.

(By Mr. Casey:)

I am the plaintiff in this action. At the time of the accident I had been working for the Merrill & Ring Logging Company nine and three-quarters days. At the time of the accident I was second loader, loading logs on cars. I had worked there before in 1911, and on three separate occasions in the course of as many years. The logs are brought down over the railroad, thrown into the waters of Puget Sound and then tugs come and take them away to Everett and Mukilteo. They have a regular railroad over which they can run any kind of cars. I have seen Northern Pacific and Great Northern cars there. They are taken to the mill and cut, then loaded on the cars and boats and shipped all over the world, and all the lumber they load in the cars most of it goes back east and some to British Columbia, Canada. I have seen them loaded upon the cars at the different sawmills where Merrill & Ring's logs go, and on foreign boats—not tugs; the tugs haul the logs from Merrill & Ring's boom to Everett and to Mukilteo. The poles and piling that they bring down over this road—once I saw them loaded in a boat after they had been towed to Everett. The boats had foreign flags. I myself have never been in either the Crown mill or the Weyerhauser mill. [9]

16 O. S. HANSON called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

(By Mr. Casey:)

I am Manager of the National Pole Company, which buys poles from the Merrill & Ring Logging Company. We ship them by boat to California. We buy them in the woods along the line of defendant's railroad; that is, we buy the stumpage from the Merrill & Ring Company and handle the poles. They deliver them to us at their boom at the end of their road, where they are dumped off the cars into the water. From that place we crib them up and tow them to Everett. We buy and pay for them when they are delivered in the water, after which time the Merrill & Ring Company has nothing whatever to do with them.

W. H. BONNER called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

(By Mr. Casey:)

I am Manager of the Weyerhauser Mill Company's plant at Everett. We have from time to time during the last two years bought quite a few logs from the Merrill & Ring Lumber Company. We get the logs which I buy from Merrill & Ring at their boom and tow them to our mill. We then saw the logs into lumber, which we sell. We market the larger part of our products, including the logs purchased from Defendant, throughout the middle prairie states by rail; 15 or 20 per cent. of it in the State of Washington. [22]

Cross-examination.

(By Mr. Hughes:)

We buy logs of the Merrill & Ring Logging Company at their boom at the end of their logging road. We send our own tugs and tow the rafts and logs from that point to our mill. They have
17 nothing to do with them after they deliver them at their boom. After such delivery they have no interest or connection in those logs. Our concern owns a large lumber mill engaged in manufacturing lumber. These logs are but a part of the logs used for manufacturing purposes in our mill. We get logs from other concerns as well. When we receive an order for lumber we deliver it on board the car and forward the bill-of-lading to the purchaser, to pay us for the lumber, as shown in that bill-of-lading. We have no responsibility after we load it in the car and bill it. Our delivery is made by delivering it in the car to the railroad company, consigned to the purchaser.

Thereupon plaintiff rested.

Whereupon the defendant interposed a challenge to the sufficiency of the evidence, and moved the Court to direct a verdict and judgment be entered in favor of the defendant, upon the following grounds, viz:

First. That the testimony in this case does not establish that the defendant is a common carrier by rail;

Second. That it is not engaged as a common carrier in interstate commerce; and

Third. That it does not establish that the plaintiff was at the time of his injury engaged in the service [23] of a common carrier by rail in interstate commerce—engaged in any degree or in any measure in interstate commerce; and for these reasons no cause of action is made out against the defendant in this case, nor has the Court any jurisdiction of the subject matter or the parties.

Thereupon the Court, after argument by respective counsel for the plaintiff and defendant, withdrew the case from the jury
18 and sustained the challenge to the sufficiency of the testimony and dismissed the action, to which the plaintiff excepted and the exception was allowed. [24]

Order Settling Bill of Exceptions.

The foregoing entitled cause coming on regularly for hearing before the Court on this 16 day of June, 1914, the time duly designated by the Court for settling and certifying the bill of exceptions therein, the plaintiff and defendant appearing by their respective attorneys of record herein, and the parties now agreeing to the settlement of the foregoing as the bill of exceptions in this action;

Now, therefore, it is by the Court and the Judge of said Court presiding at the trial of said cause, ordered and certified that the foregoing be and the same hereby is settled as the true bill of exceptions in said cause, and that the said bill of exceptions includes all the material facts and evidence herein, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions, and the same is hereby approved, allowed and made a part of the record herein, and the same being so settled and certified, it is hereby ordered to be filed herein by the Clerk, and the Clerk of this Court is hereby directed to forward the said exhibits in the usual way with the bill of exceptions as a part of the record to the Honorable Circuit Court of Appeals for the Ninth Circuit.

JEREMIAH NETERER,
Judge. [25]

[Indorsed: Filed June 16, 1914.] [26]

19 [Title of Court and Cause.]

Assignment of Error.

Comes now the plaintiff, August Bay, and files the following Assignment of Error upon which he will rely in his prosecution of his Writ of Error in the above entitled cause, in the United States Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause dismissing said action.

1. The Honorable District Court erred in granting the motion of the defendant for a nonsuit at the close of plaintiff's case.

2. The Honorable District Court erred in overruling plaintiff's motion for a new trial.

Wherefore, plaintiff, plaintiff in error, prays that the nonsuit and Judgment of Dismissal of the Honorable District Court for the Western District of Washington, Northern Division, be reversed and that directions be given that plaintiff may have a new trial of said cause and that full force and efficiency may inure to the plaintiff by reason of his prosecution of said cause.

JOHN T. CASEY,
Plaintiff's Attorney.

[Served June 22, 1914.] [27] [Indorsed: Filed June 22, 1914.] [28]

[Title of Court and Cause.]

Petition for Writ of Error.

The plaintiff, August Bay, feeling himself aggrieved by the nonsuit and judgment dismissing his action entered in the above entitled cause, comes now by his attorney and petitions this Honorable Court for an order allowing him to prosecute a writ of error to the Honorable Circuit Court of Appeals of the United States for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided and without the payment of costs in advance or the giving of security for the same as provided in his affidavit heretofore filed herein.

JOHN T. CASEY,
Plaintiff's Attorney.

[Indorsed: Filed June 22, 1914.] [29]

[Title of Court and Cause.]

Order Allowing Writ of Error.

Upon motion of John T. Casey, attorney for the above named plaintiff, and upon filing a petition for a Writ of Error and Assignment of Errors as required by law, it is hereby

Ordered, that a Writ of Error be and is hereby allowed to have reviewed in the Honorable Circuit Court of Appeals of the United States for the Ninth Circuit the judgment entered herein dismissing plaintiff's action; [and it is further ordered, upon the affidavit in Forma Pauperis heretofore filed herein by the plaintiff, that the transcript of the record be prepared and forwarded by the Clerk without the payment by the plaintiff of any costs in advance; and without the filing of a cost bond in his behalf,]* And it is further ordered that the exhibits filed in the cause be forwarded separately by the Clerk in the usual way, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

In Witness Whereof, the above order is granted and allowed, this 22d day of June 1914.

JEREMIAH NETERER.
Judge.

[Indorsed: Filed June 22, 1914.]

[* Matter enclosed in brackets erased in copy.]

21 [Title of Court and Cause.]

[*Opinion*] *on Motion for New Trial After Non-Suit.*

Motion denied.

John T. Casey for Plaintiff; Hughes, McMicken, Dovell & Ramsey for Defendant.

Plaintiff cites the following authorities:

Colasurdo v. Central Ry., 180 Fed. 832;
The Daniel Ball v. U. S., 10 Wall. 557;
El Paso Ry. v. Gutierrez, 215 U. S. 88;
Slocum v. New York Life Ins. Co., 228 U. S. 364;
Pederson v. Delaware, etc., Ry. 229 U. S. 146;
St. Louis Ry. Co. v. Seale, 229 U. S. 156;
U. & W. Ru. Co. v. Earnest, 229 U. S. 114;
I. C. Ry. v. Porter, 207 Fed. 311, 315;
Winona Ry. v. Blake, 94 U. S. 179;
State ex rel. Clark v. Superior Court, 62 Wash. 612;
North River Boom Co., 15 Wash. 138;
State ex rel. Wilson v. Superior Court, 47 Wash. 397;
State ex rel. Burrows v. Superior Court, 48 Wash. 277;
McCall v. People, 136 U. S. 104;
Railroad Co. v. Worthington, 225 U. S. 101;
R. R. Comm. v. Texas Ry., Decided June 10, 1913;
Behrens v. Ry., 192 Fed. 581;
Dorr v. Ry., 197 Fed. 665;
Thompson v. Ry., 205 Fed. 202;
Northern Pacific Ry. v. Maekl, 198 Fed. 1;
Worthington v. Elmer, 207 Fed. 306;
R. R. Commission of La. v. Tex. & Pac. Ry., No. 17;
Ad. Sheets, 837, Decided June 10, 1913;
General Oil Co. v. Grain, 209 U. S. 212;
Dozier v. Alabama, 218 U. S. 124; 127;
Rearick v. Pennsylvania, 203 U. S. 507;
in re Selman, 204 Fed. 839;
Baltimore v. Darr, 204 Fed. 751;
Rosenbaum Co. v. Ry., 130 Fed. 46;
State v. Ry., 44 S. W. 542;
Caldwell v. Nor. Car., 187 U. S. 622;
Houston v. Ins. Co., 30 L. R. A. 713;
I. C. C. v. Ry., 215 U. S. 452;
Texas Ry. v. R. R. Commission, 183 Fed. 1005;
Horton v. Ry., 72 Wash. 503;
U. S. v. Colorado Ry., 157 Fed. 321;
Robbins v. Shelby Co., 120 U. S. 489;
Mondou v. N. Y. Ry., 223 U. S. 1;
Kelly v. Rhodes, 188 U. S. 1;
U. S. v. Ry., 197 Fed. 624;

So. Ry. v. Gadd; 207 Fed. 277;
Yazoo Ry. v. Wright, 207 Fed. 281;
Walker v. New Mexico & S. O. R. Co., 165 U. S. 593; [31]
U. S. v. Union Stock Yards, No. 4 Ad. Sheets, 83, Decided Dec. 9, 1912.

NETERER, *District Judge:*

The testimony upon the trial on the part of the plaintiff established the fact that the defendant was the owner of a large
22 tract of timber land in King and Snohomish counties, and was engaged in logging the land, selling all logs upon the open market; and in connection with this land it owned a logging road of standard guage build which was connected by switch or siding with the Great Northern Railway; that the defendant operated over its road engines and logging cars; that it has large booming grounds in the waters of Puget Sound about two miles below Mukilteo; that it operates several large logging camps upon its lands; that over its logging road it runs five or six logging trains each day to and from its various camps and places in its boom over half a million logs per day; that the logs are sold by the defendants to the various mills upon Puget Sound; that poles and piles which it cuts from its land are sold to a company which ships them to California; that the logs are sold by it from its boom to the Weyerhouser Mill at Everett, and are manufactured by said mill with other logs purchased by it from other sources and sold on the market upon orders which are received by the mill from the eastern and central western states and coast cities, and from foreign countries, and from the state of Washington; that about 80% of the output of the mill is shipped to other states or countries; that the defendant is a corporation organized under the laws of the state of Washington, and among its authorized powers is that of common carrier together with numerous other powers; that the defendant never at any time operated its road as a common carrier or tendered it in any way to the public for service; that the services rendered by the said road [32] have all been private, and for the purpose of carrying to the booming ground of the defendant the timber taken from its land; that no other product has been taken over the road except some timber taken from the land of another under contract with the defendant to log the land for the owner, and deliver the logs in the waters of Puget Sound; and certain poles or piles taken from the land of the
23 defendant which were sold to the National Pole Company at a certain rate per stumpage delivered at the boom of the defendant company; that no service was rendered by the plaintiff in the hauling of any of the poles.

After the plaintiff rested his case, the defendant moved for a non-suit on the ground that there was no testimony to sustain a verdict. The motion was granted. A motion for a new trial has been filed and submitted.

It is strongly urged by the plaintiff that the court erred in granting motion for non-suit, citing Slocum v. New York Life Ins. Co., 227 U. S. 364. It is urged in argument that it is the duty of the

judge to submit a case to the jury upon the testimony which is presented, and let the jury determine whether recovery should be had, upon the instructions which the court gives upon the law, and that it is an invasion of the constitutional right of the plaintiff to deprive plaintiff of this privilege.

In the Slocum case the trial judge submitted the issues to the jury upon the testimony which was presented on the part of the litigants. Thereafter a judgment was entered non obstante veredicto by the circuit court of appeals. The supreme court held that this was an infraction of the 7th Amendment to the Constitution of the United States, which provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined than according to the rules of the common law."

The court stated that the entering of a judgment by the court non obstante veredicto was the trial of an issue that had been submitted to the jury, and that the power of the court was limited [33] to granting a new trial. The same case, however, holds,—and this has been recognized by all of the federal courts—that where there is no testimony to support a verdict, it is the duty of the court to grant a dismissal. The judge's function is to superintend and direct the course of trial, and the jury are to determine the ulti-
24 mate facts in issue; and when the facts disclosed by the testimony clearly cannot under the law support a verdict, it would be useless to submit it to a jury.

The act under which this action is prosecuted provides:

"That every common carrier by railroad while engaged in commerce between any of the several states * * * shall be liable in damages," etc.

In order for the plaintiff to recover he must establish that the defendants owned and operated a common carrier railway and was engaged in interstate or foreign commerce, and that the plaintiff was employed by the defendant in such trade or commerce and was injured while so employed.

Second Employers' Liability Cases, 223 U. S. 1;
Pederson v. Del. Lack. & West. Ry., 229 U. S. 146.

A common carrier is one who undertakes to transport for hire from one place to another the goods of such as choose to employ him.

2 Words & Phrases, 1312;
Jacoson, etc., Iron Works v. Hurlbut, 52 N. E. 665.

A concern is not a common carrier that is engaged in transporting its own products, and before a concern incorporated as a common carrier could come within the terms of the Employers' Liability Act of Congress, it would have to do something further than merely file its articles of incorporation. The timber holdings and the railroad are held by the same concern, operated together as one property; the

railroad is used as a "plant" facility to bring the logs to the booming grounds of the defendant on tide water.

Joint Rates with Wash. Western Ry., 27 I. C. C. 630.

The defendant was simply engaged in placing the product of its own land in its own booming grounds so as to be in a marketable condition. The act of the defendant in placing its logs in the
25 boom [34] or sale grounds can best be compared to the farmer placing his corn or wheat in a crib or granary, and when so placed to dispose of it upon the market to persons offering the best prices. So long as the product of the forests of the defendant remained in the boom grounds, it certainly cannot be contended that any relation of common carrier or interstate commerce could enter into or attach thereto. If no interstate commerce character or common carrier relation could attach to the logs in the boom by being permitted to remain there covering a long period of time, the fact that they remained there for a short interval cannot change that relation or character.

It b-comes important to know when the logs in issue began their final journey to the market and to their final destination? A commodity is not in interstate commerce until it has entered upon its final passage to another state or foreign country.

"Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

The Daniel Ball Case, 10 Wall. 565.

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state."

Coe v. Errol, 116 U. S. 517, 525.

The same language is in substance and effect repeated by the same court in every case which has been called to my attention. "Continuity of movement," said the supreme court in the Sabine Tram case 227 U. S. 111, "is the concluding factor in determining
26 whether a commodity has started on its ultimate passage to a foreign state."

The Supreme Court of the United States in Bacon v. Illinois, 227 U. S. 504, which was a case where grain was purchased in localities in a number of states and shipped by original owners who were residents of such states and consigned to New York, Philadelphia and other eastern cities, the owner reserving the [35] right to remove the grain at Chicago for the purpose of weighing, cleaning, inspecting, etc., and thereafter to be reshipped to destination and consignees

at the election of the owners, held that the owner had the privilege of continuing the transportation under the shipping contract, of which he might avail himself, but that this provision in the contract made it optional with the owner whether the grain should continue to its destination or not, and when it was taken from the cars at Chicago to the private elevator that the transportation had ceased and the interstate commerce character had been ended. In the instant case the logs had not entered upon a final journey to their ultimate destination. They had simply been accumulated in their raw state and shipped to the boom grounds where they were distributed to the various mills which purchased the logs and manufactured them into lumber. I do not believe that the act was intended to cover such a case, and the conclusion is inevitable that the facts in this case do not bring the plaintiff within the liability act, under which this action is prosecuted. Any other conclusion on the part of the court, it seems to me, would be revolutionary in endeavoring to adopt a plan or system which had not been contemplated by congress to the business interests of the country, and no good purpose could be subserved.

The motion for a new trial is denied.

JEREMIAH NETERER, *Judge.*

[Indorsed: Filed Feb. 20, 1914.] [36]

27 [Title of Court and Cause.]

Writ of Error.

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the nonsuit and judgment of an action which is in the District Court before you, or some of you, between August Bay, Plaintiff in Error, and the Merrill & Ring Logging Company, a corporation, Defendant in Error, a manifest error hath happened to the damage of the said Plaintiff in Error, as by his complaint appears, and we being willing that error, if any hath happened should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, under your seal, distinctly and openly, that you send the record and proceedings aforesaid, with all things concerning the same to the Circuit Court of Appeals of the United States for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California in said Circuit within thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct

that error, what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 22d day of June, A. D. 1914, together with the seal of said Court.

FRANK L. CROSBY,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division. [37]

[Indorsed: Filed June 22, 1914.] [38]

28 [Title of Court and Cause.]

Citation.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Merrill & Ring Logging Company, a Corporation, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the Court room of said Court, in the City of San Francisco, and State of California, within thirty days from the date of this Citation, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein August Bay is Plaintiff in Error, and Merrill & Ring Logging Company is Defendant in Error, to show cause if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, and the seal of said Court this 22d day of June, A. D. 1914.

JEREMIAH NETERER,
Judge of the District Court of the United States for the Western District of Washington, Northern Division.

[Served June 22, 1914.] [39]

[Indorsed: Filed June 22, 1914.] [40]

[Title of Court and Cause.]

Stipulation.

It is hereby stipulated and agreed between the parties hereto, that the transcript of the record shall include only the following papers, to-wit:

1. This Stipulation. 2. Complaint. 3. Amended answer. 4. Judgment of nonsuit and dismissal. 5. Bill of Exceptions
29 with Order settling same. 6. Assignment of Errors. 7. Petition for Writ of Error. 8. Order allowing Writ of Error. 9. Writ of Error. 10. Citation. 11. Opinion of the Court.

JOHN T. CASEY, *Plaintiff's Attorney.*
HUGHES, McMICKEN, DOVELL & RAMSEY, *Defendant's Attorneys.*

[Indorsed: Filed July 1, 1914.] [41]

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Transcript of Record, etc.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing 41 typewritten pages, numbered from 1 to 41, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on return to said Writ of Error herein from the order of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that this cause was prosecuted in forma pauperis and that no expense, costs or fees have been charged or col-
30 lected. [42]

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 14th day of July, 1914.

[SEAL.]

FRANK L. CROSBY, *Clerk,*
By ED M. LAKIN, *Deputy.* [43]

[Title of Court and Cause.]

Writ of Error.

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the nonsuit and judgment of an action which is in the District Court before you, or some of you, between August Bay, Plaintiff in Error, and the Merrill & Ring Logging Company, a corporation, Defendant in Error, a manifest error hath happened to the damage of the said Plaintiff in Error, as by his complaint appears, and we being willing that error, if any hath happened should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, under your seal, distinctly and openly, that you send the record and proceedings aforesaid, with all things concerning the same to the Circuit Court of Appeals of the United States for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California in said Circuit within thirty days
31 from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 22nd day of June, A. D. 1914, together with the seal of said Court.

FRANK L. CROSBY,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division. [44]

[Indorsed: Writ of Error. Filed June 22, 1914.] [45]

[Title of Court and Cause.]

Citation.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Merrill & Ring Logging Company, a Corporation, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the Court room of said Court, in the City of San Francisco, and State of California, within thirty days from the date of this Citation, pursu-

ant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein August Bay is Plaintiff in Error, and Merrill & Ring Logging Company is Defendant in Error, to show cause if any there be why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, and the seal of said Court this 22 day of
32 June, A. D. 1914.

JEREMIAH NETERER,
Judge of the District Court of the United States for the Western District of Washington, Northern Division.

[Served June 22, 1914.] [46]
[Indorsed: Filed June 22, 1914.] [47]

33 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2447.

AUGUST BAY, Plaintiff in Error,
vs.
MERRILL & RING LOGGING COMPANY, a Corporation, Defendant in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

34 [Title of Court and Cause.]

Stipulation. [*Waiving Error, if Any, as to Entry of Judgment of Dismissal.*]

It is hereby stipulated and agreed, by and between the respective parties hereto, that if the District Judge before whom this cause was tried had the power to direct a verdict in favor of the defendant at the close of plaintiff's evidence in this cause, any error arising from the fact that he merely entered judgment of dismissal, instead of directing the jury to return a verdict in favor of the defendant, is hereby waived.

Dated: September 8, 1914.

JOHN T. CASEY,
Attorney for Plaintiff in Error.
HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant in Error.

[Endorsed: Filed Sep. 11, 1914.]

At a stated term, to-wit, the September Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court-Room, in the City of Seattle, in the State of Washington, on Thursday, the seventeenth day of September, in the year of our Lord one thousand nine hundred and fourteen.

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding,
Honorable Erskine M. Ross, Circuit Judge,
Honorable William W. Morrow, Circuit Judge.

No. 2447.

AUGUST BAY, Plaintiff in Error,
vs.
MERRILL & RING LOGGING COMPANY, a Corporation, Defendant in Error.

35 *Order of Submission.*

Ordered, above-entitled cause argued by Mr. John T. Casey, counsel for the plaintiff in error, and by Mr. E. C. Hughes, counsel for the defendant in error, and submitted to the Court for consideration and decision, with leave to counsel for the plaintiff in error to file a reply-brief.

At a stated Term, to-wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the first day of February, in the year of our Lord One Thousand Nine Hundred and Fifteen.

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding,
Honorable Erskine M. Ross, Circuit Judge,
Honorable William W. Morrow, Circuit Judge.

No. 2447.

AUGUST BAY, Plaintiff in Error,
vs.
MERRILL & RING LOGGING COMPANY, a Corporation, Defendant in Error.

Order Directing Filing of Opinion and Dissenting Opinion and Filing and Recording of Judgment.

Orlered, that the opinion this day rendered by this Court, as well as the Dissenting Opinion of the Honorable Erskine M. Ross, United

States Circuit Judge, appearing at the end of said opinion, in the above-entitled cause be forthwith filed by the clerk, and that a Judgment be filed, and recorded in the Minutes of this Court in said cause in accordance with said opinion.

36 [Title of Court and Cause.]

[*Opinion U. S. Circuit Court of Appeals.*]

John T. Casey for Plaintiff in Error.
Hughes, McMicken, Dovell & Ramsey for Defendant in Error.

Before Gilbert, Ross and Morrow, Circuit Judges.

The plaintiff in error was injured while in the employment of the Merrill & Ring Logging Company, the defendant in error, and while he was engaged in loading logs on a flat car in the woods, where the logs had been cut preparatory to transporting them to the waters of Puget Sound. His right to bring an action for damages in the court below under the provisions of the Federal Employers' Liability Act depended upon the answer to the question whether or not the Logging Company was at the time of the accident engaged in interstate commerce. Upon the conclusion of the trial the court directed a verdict in favor of the defendant, upon its motion, based upon the grounds, First, that the testimony did not establish that the defendant was a common carrier; and, Second, that it was not engaged as a common carrier in interstate commerce. The facts shown by the evidence are in substance as follows: The Logging Company owned extensive tracts of timber in Snohomish County, Washington, and was engaged solely in cutting logs on its own lands and hauling them over its own road to the waters of Puget Sound, where it dumped them from the cars into a boom. At that point it sold the logs to purchasers who paid for them there, and there took possession of them and towed them away by tugs. The most of the logs were sold to near-by mills on the Sound, which were engaged in the manufacture of lumber, and this lumber,
37 when manufactured, was for the most part ultimately disposed of and shipped to points outside of the State of Washington. In addition to these transactions in logs, the Logging Company had at times taken out some poles, which also it sold and delivered at its boom to the National Pole Company, a purchaser which did business at Everett, and which bought and paid for the poles after they were delivered in the water, and thereafter sold them for shipment to California. The road is a standard gauge logging railroad, and is operated as a part of the logging business of the defendant in error, and is connected by switches with the Great Northern and the Interurban roads; but those connections are used only for the purpose of bringing supplies to the company's logging camps. No logs or timber of any kind were at any time transferred to these other roads. One shipment of steel rails had

gone over the logging road for the Interurban at the time when the latter was constructing its road. For that service the actual expense of operating the locomotive was the only charge made, and the Interurban assumed all liability on account of accidents occurring in the transportation.

GILBERT, *Circuit Judge*, after stating the case:

We may assume from the evidence that the defendant in error was a common carrier, but it is clear that it was not engaged in interstate commerce. In that respect the facts in the case are identical with those which were before this court in the recent case of Nordgard v. Marysville and Northern Railway Company, and we need not add to the discussion that was there had.

The judgment is affirmed.

38 ROSS, *Circuit Judge:*

I dissent for the reasons stated in my dissenting opinion in the case of Nordgard v. Marysville and Northern Railway Company above referred to.

[Endorsed: Filed Feb. 1, 1915.]

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2447.

AUGUST BAY, Plaintiff in Error,
vs.
MERRILL & RING LOGGING COMPANY, a Corporation, Defendant in Error.

Judgment [U. S. Circuit Court of Appeals].

In Error to the District Court of the United States for the Western District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for its costs herein expended, and have execution therefor.

[Endorsed: Filed Feb. 1, 1915.]

39 At a Stated Term, To wit: the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Eighth Day of March, in the Year of Our Lord One Thousand Nine Hundred and Fifteen.

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable Charles E. Wolverton, District Judge.

AUGUST BAY, Plaintiff in Error,
vs.
MERRILL & RING LOGGING COMPANY, a Corporation, Defendant in Error.

Order Denying Petition for a Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross, and William W. Morrow, Circuit Judges, before whom the case was heard, it is ordered that the Petition, filed March 4, 1915, on behalf of the Plaintiff in Error for a Rehearing of the above-entitled cause be, and hereby is denied.

[Title of Court and Cause.]

Petition for Writ of Error [from Supreme Court U. S.]

The Plaintiff in error, August Bay, feeling himself aggrieved by the opinion and judgment of the Court in the above entitled cause, affirming the dismissal of Plaintiff's action by the District Court, comes now by his attorney, and petitions this Honorable Court for an order allowing him to prosecute a Writ of Error to the Honorable Supreme Court of the United States, under and according to
40 the laws of the United States in that behalf made and provided.

JOHN T. CASEY,
Attorney for Plaintiff in Error.

[Endorsed: Filed March 15, 1915.]

[Title of Court and Cause.]

Assignment of Error.

Comes now the above named Plaintiff in error August Bay, and files the following Assignment of Error upon which he will rely in the prosecution of his Writ of Error in the above entitled cause in the Supreme Court of the United States, for relief from the opinion

and judgment rendered and entered in the above entitled Court and cause, affirming the dismissal of Plaintiff's action in the District Court of the United States for the Western District of Washington, Northern Division.

1. The Honorable Circuit Court of Appeals erred in affirming the judgment of dismissal rendered and entered in the said District Court of the United States for the Western District of Washington, Northern Division, and in refusing the Plaintiff therein a new trial.

Wherefore, Plaintiff, Plaintiff in Error, prays that the said judgment of the United States Circuit Court of Appeals, Ninth Circuit, affirming the said judgment of the said District Court, and also that the judgment of the said District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that directions be given that Plaintiff, Plaintiff in error, may have a new trial, and a trial on the merits, of said cause and that full force and efficiency may inure to the Plaintiff, Plaintiff in error, by reason of his prosecution of his said cause of action herein.

JOHN T. CASEY,
Attorney for Plaintiff in Error.

41 [Served March 12, 1915.]
[Endorsed: Filed March 15, 1915.]

[Title of Court and Cause.]

Order Allowing Writ of Error [from Supreme Court U. S.].

Upon motion of John T. Casey, attorney for August Bay, the above named Plaintiff in error, and upon filing a petition for a Writ of Error and Assignment of Errors, as required by law, it is hereby:

Ordered, that a Writ of Error be and is hereby allowed to be reviewed in the Honorable Supreme Court of the United States, a judgment rendered and entered herein affirming the judgment of dismissal entered in the District Court of the United States for the Western District of Washington, Northern Division, and that the transcript of the record be prepared and forwarded by the Clerk of this Court without the payment by the Plaintiff in error of costs in advance and without the filing of a Cost Bond in his behalf; and that the clerk of this Court sign, seal and issue said writ of error.

And it is further ordered that the exhibits and record be forwarded in the usual way to the Clerk of the Supreme Court of the United States at Washington, District of Columbia.

In witness whereof, the above order is granted and allowed this 15 day of March 1915.

WM. B. GILBERT,
Senior U. S. Circuit Judge.

[Endorsed: Filed March 15, 1915.]

42 [Title of Court and Cause.]

Stipulation.

It is hereby stipulated that the transcript of the record on return to the Wri of Error from the Supreme Court of the United States in the above entitled cause may consist of a copy of the following:

1. Certified transcript of the record on which said cause was heard, in said Circuit Court of Appeals.
2. Stipulation Waiving Error, if any, as to entry of judgment of dismissal in court below.
3. Opinion and Dissenting Opinion.
4. Judgment.
5. Petition for Writ of Error returnable in United States Supreme Court.
6. Order allowing said Writ of Error.
7. Assignment of Errors on said Writ of Error.
8. Certificate of Clerk to transcript of record on return to said Writ of Error.
9. This Stipulation.
10. Original Writ of Error.
11. Original Citation on said Writ of Error.
12. Exhibits.

JOHN T. CASEY,
Counsel for Plaintiff in Error.
HUGHES, McMICKEN, DOVELL & RAMSEY,
Counsel for Defendant in Error.

[Endorsed: Filed Apr. 12, 1915.]

43 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2447.

AUGUST BAY, Plaintiff in Error,
vs.
MERRILL & RING LOGGING COMPANY, a Corporation, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Return to Writ of Error from Supreme Court U. S.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-two (42) pages, numbered from and including 1 to and including 42, to be a true copy of the complete record, made pursuant to the stipulation of counsel for the respective parties, filed on the 12th day of April, A. D. 1915, under Rule 8 of the Supreme Court

of the United States, in the above-entitled case, including the Assignment of Errors filed on the writ of error from said Supreme Court, and of all proceedings had, and of all papers, including the opinion and dissenting opinion, filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record, on return to the annexed writ of error from the Supreme Court of the United States in the above-entitled cause, as made and certified pursuant to the said stipulation.

Attest my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-ninth day of April, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER,
Deputy Clerk.

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled Apr. 29, 1915. F. D. M., by M. S.]

44 In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2447.

AUGUST BAY, Plaintiff in Error,
vs.
MERRILL & RING LOGGING COMPANY, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the above entitled cause affirming the judgment of the District Court of the United States for the Western District of Washington, Northern Division, before you, or some of you, in an action wherein August Bay is plaintiff in error and Merrill & Ring Logging Company, a corporation, is Defendant in error, manifest error hath happened, to the damage of the said Plaintiff in error as by his complaint in the said District Court and his Petition and Assignment of Errors appears, and we being willing that error, if any hath happened should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, under your seal, distinctly and openly, that you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this Writ so that you have the same in the said Supreme Court of the

United States at Washington City, District of Columbia, within the time allowed by law, after the date of this Writ, that the
45 record and proceedings aforesaid, being inspected, said Supreme Court of the United States may cause further to be done therein to correct said error which of right and according to law and the custom of the United States ought to be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States this 15th day of March, A. D. 1915, together with the seal of said Circuit Court of Appeals.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

Allowed by
WM. B. GILBERT,
Senior U. S. Circuit Judge.

46 [Endorsed:] Docketed. No. 2447. (Original.) In the U. S. Circuit Court of Appeals, Ninth Circuit. August Bay, Plaintiff in Error, vs. Merrill & Ring Logging Co., Defendant in Error. Writ of Error. Original. Due service of the enclosed writ of error admitted and a true copy received this 19 day of March 1915. Hughes, McM., D. & R., Attorneys for Defendant in Error. Filed Mar. 23, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. John T. Casey, Attorney for Plaintiff in Error. Suite 440 New York Block; phone Main 3328, Seattle, Washington.

47 *Return to Writ of Error.*

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error:

As within we are commanded, we certify under the Seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By MEREDITH SAWYER,
Deputy Clerk.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Apr. 29, 1915. F. D. M., by M. S.]

48 In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2447.

AUGUST BAY, Plaintiff in Error,
vs.
MERRILL & RING LOGGING COMPANY, Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Merrill & Ring Logging Company, a corporation, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the Court Room of said Court in the City of Washington, District of Columbia within sixty days from the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein August Bay is Plaintiff, Plaintiff in error, and Merrill & Ring Logging Company, a corporation, is defendant, defendant in error, to show cause if any there be, why the opinion and judgment in the said Circuit Court of Appeals, affirming the judgment of dismissal in the said District Court, and also the judgment in the said District Court of the United States for the Western District of Washington, Northern Division, dismissing Plaintiff's action without a trial on the merits, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States and the seal of said Court this 22nd day of March A. D. 1915.

WM. B. GILBERT,
One of the Judges of the U. S. Circuit Court of Appeals, Ninth Circuit.

49 [Endorsed:] Docketed. No. 2447. (Original.) In the U. S. Circuit Court of Appeals, Ninth Circuit. August Bay, Plaintiff in Error, vs. Merrill & Ring Logging Co., Defendants in Error. Citation. Due service of the enclosed citation admitted and a true copy received this 23 day of March 1915. Hughes, McMicken, Dovell & Ramsey, Attorneys for defendant in error. Filed Mar. 30, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit by Meredith Sawyer, Deputy Clerk. John T. Casey, Attorney for Plaintiff in Error. Suite 440 New York Block, phone Main 3328, Seattle, Washington.

50 In the Supreme Court of the United States.

No. 1052.

AUGUST BAY, Plaintiff in Error,
vs.
MERRILL & RING LOGGING COMPANY, a Corporation, Defendant in Error.

Statement.

Comes now the Plaintiff in Error, and makes and files the following statement of errors, on which he intends to rely, and hereby designates the parts of the records to be printed by the Clerk of the above entitled Court, in case his motion in forma pauperis is not allowed:

I.

Plaintiff in Error states that the error on which he intends to rely, is the dismissal of his cause of action by the trial Court, without allowing the jury to pass upon the questions of fact raised by the pleadings and the evidence submitted at the trial, and the denial of his motion for a new trial.

II.

The affirmance of the judgment of the trial Court by the Circuit Court of Appeals.

III.

Plaintiff in Error believes the only parts of the Record necessary to be printed, for the consideration of this case, are, 1, Complaint, 2, Amended Answer, 3 Judgment of Dismissal, 4, Bill of Exceptions, 5, Judgment of Affirmance.

GEORGE F. HANNAN,
JOHN T. CASEY,
Attorney- for Plaintiff in Error.

[Endorsed:] 513—15/24796. No. 1052. In the Supreme Court of the United States. August Bay, Plaintiff in Error, vs. Merrill & Ring Logging Company, a corporation, Defendant in Error. Statement. John T. Casey, Attorney for Plaintiff in Error, 736-7-8 New York Block, Seattle, Washington.

51 Due Service of the within Statement admitted and Copy received this 7th day of September, 1915.

E. C. HUGHES,
HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant in Error.

52 [Endorsed:] File No. 24,796. Supreme Court U. S., October term, 1915. Term No. 513. August Bay, Pl'ff in Error, vs. Merrill & Ring Logging Company. Statement of errors and designation by plaintiff in error of parts of record to be printed. Filed September 13, 1915.

Endorsed on cover: File No. 24,796. U. S. Circuit Court Appeals, 9th Circuit. Term No. 513. August Bay, plaintiff in error, vs. Merrill and Ring Logging Company. Filed June 15, 1915. File No. 24,796.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted] 165

AUGUST BAY, PLAINTIFF IN ERROR,

vs.

MERRILL & RING LOGGING COMPANY.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PROOF OF SERVICE OF SAME.

GEORGE F. HAMAN,
JOHN T. CASEY,
Attorneys for Plaintiff in Error.

(24,796)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 513.

AUGUST BAY, PLAINTIFF IN ERROR,

vs.

MERRILL & RING LOGGING COMPANY,
DEFENDANT IN ERROR.

MOTION.

Comes now August Bay, the plaintiff in error in the above-entitled cause, and moves the court for an order allowing him to prosecute his writ of error herein, *in forma pauperis*, under the act of June 25, 1910 (36 Stat., 866), and for an order relaxing the rules of this court in so far as the same require the payment of fees and the printing of the record herein.

This motion is made and based upon the affidavit and state-

ment of the plaintiff in error heretofore filed herein and on the records and files herein.

GEORGE F. HAMAN,
JOHN T. CASEY,
Attorneys for Plaintiff in Error.

[Endorsed:] No. —. (Original.) In the U. S. Supreme Court. August Bay, plaintiff in error, *vs.* Merrill & Ring Logging Company, defendant in error. Due service of the enclosed motion admitted and a true copy received this 10th day of June, 1915. Hughes, McMecken, Dovell & Ramsey, attorneys for defendant in error. Motion. George F. Haman and John T. Casey, attorneys for plaintiff in error, suit 440, New York Block, phone main 3328, Seattle, Washington.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 513.

AUGUST BAY, *Plaintiff in Error,*

vs.

MERRILL & RING LOGGING COMPANY, *Defendant in Error.*

MOTION.

Comes now the above-named plaintiff in error and moves the court in the above-entitled cause for an order allowing him to prosecute his writ of error herein, *in forma pauperis*, under the act of June 25, 1910 (36 Stat., 866), and for an order relaxing the rules of this court accordingly.

This motion is made and based upon the affidavit and statement of the plaintiff in error hereto attached and on the records and files herein.

JOHN T. CASEY,
Attorney for Plaintiff in Error.

Service of the above and foregoing motion of plaintiff in error asking for an order to prosecute his writ of error herein *in forma pauperis*, together with his statement and affidavit therefor, admitted and copies received this 11th day of May, 1915, and it is hereby stipulated that said matter may be passed upon by the court without further notice and without argument in opposition thereto.

E. C. HUGHES,
Attorney for Defendant in Error.

HUGHES, McMECKEN,
DOVELL & RAMSEY,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 513.

AUGUST BAY, *Plaintiff in Error,*
vs.
MERRILL & RING LOGGING COMPANY, *Defendant in Error.*

AFFIDAVIT AND STATEMENT.

STATE OF WASHINGTON,
County of King, ss:

August Bay, being first duly sworn, on oath, deposes and says: That he is a citizen of the United States and the plaintiff in error in the above-entitled cause; that affiant has no means of prosecuting his writ of error herein, and that because of poverty I am unable to pay the costs of prosecuting the writ of error herein, and I am unable to give security for the same, and I believe that I am entitled to the redress which I seek in said writ of error.

That on the 21st day of October, 1912, affiant was badly injured and his right leg was crushed while in the employ of the defendant in error, loading logs on the railroad cars of the defendant in error, and thereafter affiant's leg was amputated. That said accident occurred through the alleged fault and negligence of plaintiff in error, as stated and alleged in plaintiff's complaint herein, and plaintiff in error was at that time permanently and partially disabled, and plaintiff in error alleges that he was in the employ of the defendant in error, and said defendant was a common carrier railroad engaged in interstate and foreign commerce, and plaintiff was employed by said defendant in such commerce at the time of his injuries and while said defendant in error owned and operated a common-carrier railroad engaged in interstate commerce.

That an order was entered in the District Court of the United States for the Western District of Washington, Northern Division, allowing the plaintiff in error to prosecute his cause of action *in forma pauperis*, and affiant asks that the foregoing motion be granted allowing him to prosecute his writ of error herein *in forma pauperis* under the said act of June 25, 1910 (36 Stat., 866), and that the rules of practice of the above-entitled court, in so far as applicable in the above-entitled cause, be relaxed accordingly.

AUGUST BAY.

Subscribed and sworn to before me this 15th day of May, 1915.

[SEAL.] J. T. CASEY,
Notary Public for State of Washington,
Residing at Seattle, Washington.

[Endorsed:] (Original.) No. —. In the Supreme Court of the United States. August Bay, Plaintiff in Error, *vs.* Merrill & Ring Logging Co., Defendant in Error. Motion, Statement, and Order *in forma pauperis*. John T. Casey, Attorney for Plaintiff in Error. Suite 440 New York Block, Phone, Maine 3328, Seattle, Washington.

[Endorsed:] File No. 24,796. Supreme Court U. S. October term, 1915. Term No. 513. August Bay, pl'ff in error, *vs.* Merrill & Ring Logging Company. Motion for leave to proceed *in forma pauperis* and proof of service of same. Filed June 15, 1915.

In the Supreme Court of the United States

AUGUST BAY,
Plaintiff in Error,
vs.
MERRILL & RING LOGGING COMPANY,
Defendant in Error.

No. 165

October Term, 1916.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

Reply Brief of Plaintiff in Error

COMMON CARRIER QUESTION.

On page 2 of Defendant's brief, it is stated, Defendant never performed its functions as a common carrier. The Liability Act, however, makes no test of how much or how little a railroad is exercising its various functions, or using its rights as a common carrier *other than carrying interstate com-*

merce. Counsel confuses the exercise of functions with their possession.

Further: that it was engaged only in logging its own timber. This is immaterial if the product moved over its road and finally reached other states. It was also engaged in *railroading,* in which work plaintiff was employed. Railroads are liable for negligence while hauling their empty cars the same as when loaded.

North. Car. Ry. vs. Zachary, 232 U. S. 248; 58 L. Ed. 591.

The employee is not concerned with ownership of freight. His work is the same no matter who holds the title, and the Act makes no discrimination between logs or poles, and other freight.

Defendant says further:

"The status of a railroad such as this one is fixed by the real and actual scope of its operations, and the fact that it has reserved and unexercised powers of a common carrier will not make it such when it is acting outside the scope of the duty of a common carrier," and cites:

Santa Fe Ry. Co. v. Grant Bros., 228 U. S. 177.

Shade v. Northern Pacific Ry. Co., 206 Fed. 353.

Wade v. Lutcher Lbr. Co., 74 Fed. 517.

In the Santa Fe case, this Court had before it

the construction of a contract between the parties. It merely relaxed the rule of public policy, which denies the right of a common carrier railroad to limit its liability in dealing with the ordinary shipper. Grant Bros., therein, stood on an equal footing with the railroad in making the contract. As well say, because railroads cannot limit their liability for the *negligent injury of passengers for hire,* that therefore they cannot limit it on a free pass where one assumes all risks in his gratuitous passage.

In the Wade case, a mother sued for the negligent killing of her son, an employee riding in violation of company rules. The trial court refused to instruct the Jury that defendant was held to the same high degree of care as when carrying *passengers for hire.* After verdict for Defendant, and appeal, the higher court said of the requested instruction:

"As we view the charge, it was clearly calculated to mislead the jury in these respects, and particularly as to the difference in responsibility and duties between *public carriers of passengers for hire* and *private carriers permitting gratuitous travel on their roads,* and vehicles."

It is rudimentary these cases have no application.

In the Shade case a demurrer to the complaint

was sustained because it did not allege one of the defendants was a common carrier.

Most of the opinion is *obiter dicta* on what "common carrier" ordinarily means, outside the statute. This Court in *U. S. v. Ry.*, 234 U. S. 1, and the State cases cited on page 10 of our opening brief, make a clear distinction. Washington decisions on State laws control, though a different rule might prevail in other jurisdictions. *Old Colony Trust Co. v. Omaha,* 230 U. S. 100. The Shade decision seems also to have overlooked Sub-division 7 of the Liability Act.

Defendant cannot say when it seeks to condemn land under Eminent Domain that it *is a common carrier,* and in defending a damage action that it is *not a common carrier.* If the Federal Act is of any value, a concern cannot play fast and loose with the law in such a manner. Injured plaintiffs should not be required to prove immaterial questions concerning the active and dormant powers of their employers. The State grants these privileges, only when the road consents to become a common carrier. If the question is material, and not admitted, its Articles, with the other evidence, should be submitted to the jury to find the fact. The Trial Court had no right to hold Defendant's Articles did not tend to

prove the question. What better evidence could be had than its own solemn written declaration that it was a common carrier? The Articles should be taken at their face value. If not, the Jury should settle the question. The words "common carrier" are merely recited in the Liability Law. To suit Defendant's purpose, they would have it read thus:

> "That every common carrier by railroad, while engaging in commerce between any of the States (*but not while hauling its own property*) . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."

The Trial Court should not disregard the best evidence obtainable and summarily dismiss the case without a verdict on the fact issues raised in the pleadings. Counsel argues that because defendant is not generally using all its powers, that therefore it does not possess them. If further answer is needed, it is found in the cases cited on pp. 10-12 of our opening brief.

INTERSTATE COMMERCE.

It is contended there is no evidence that Plaintiff in Error was injured while employed in interstate commerce because not loading *poles*. The essential facts are overlooked in argument. There is ample testimony in the record for a jury to find that both

logs and poles moved in interstate commerce. If not, that Bay's work loading logs *was necessary* to move the *poles*. Secy. Jerome admitted (Tr. 7) they were taking out 200,000 feet daily—38 or 40 cars. All poles are logs, though usually cut in longer lengths, and are often used indiscriminately in testimony. It would be a radical assumption to make without a verdict, however, that there were no poles on forty cars; or on ten cars, if made into four trains. The cars in each train move together, and if the poles alone, and not the logs, were moving in interstate commerce, the Jury might find it was essential to get the logs all loaded before the poles on the train could move toward California. See: *New York C. Ry. v. Carr,* 238 U. S. 260; *Seaboard Ry. v. Koennecker,* 239 U. S. 352; *N. C. Ry. v. Zachary,* 232 U. S. 248, *supra; Louisville & N. Ry. v. Parker,* No. 330, decided this Term; and *Southern Ry. v. U. S.,* 222 U. S. 20.

Logs and poles were separated at Defendant's boom. The poles went direct to California. The logs to the mill, and then in changed form, to the Prairie States. Both were moving in a continuous stream to supply an interstate trade. Defendant's whole effort is to have its part of this work considered separately. To show an intrastate movement

only. But the work did not end there—only started. How did the commodities get to the other States? If not first carried over defendant's railroad, the other carriers could not finish the trip. Defendant's part of the work was just as essential as the other parts, in taking logs and poles from Washington State and supplying other States with these commodities. If continuous movement is necessary, the Jury could find it from the testimony. The only storage was in the woods. *There were no delays of consequence in transit.*

After the timber was cut, it went to the interstate market as fast as it could be sent. That was defendant's purpose in cutting it. To get it to market it must also be loaded on the cars. The case is complete with either logs or poles, under *United States v. Ry.*, 234 U. S. 1, *supra,* and other cases cited on pp. 15-17 of the opening brief.

Transportation, to be interstate commerce, is not necessarily continuous, or by one carrier alone, as urged by Defendant in Error. They cite the Daniel Ball case, 10 Wall. 557. Yet it is squarely against these contentions. *Coe v. Erroll,* 116 U. S. 517; *Diamond Match Co. v. Octonagon,* 188 U. S. 82; *Kelley v. Rhoades, Id.* 1; *General Oil Co. v. Crain,* 209 U. S. 211; and *Bacon v. Illinois,* 227 U. S. 504, are all

taxation cases. In each it was admitted part or all the property was in *interstate* commerce, and on that feature (if carried on a railroad) would support an action under the Federal Liability Law. The Principal question in each was whether the property was stopped in transit for an *indefinite* time, and for other than natural causes beyond the control of the shipper, so as to allow a local tax, without imposing an *unreasonable* burden on *interstate* commerce.

In *Coe v. Erroll,* discussed in our opening brief in the McCluskey case, No. 166, it was said regarding time:

"It was a stipulated fact that the timber thus cut had lain over one season, *being about a year,* in the Androscoggin River in that State."

The Diamond Match case was even more extreme to avoid taxes. The Company had 180,000,000 feet of logs at the Town of Ontonagon—*four years' supply.* They contended, because the property was *ready* to be moved, it should be exempt from local taxes. This Court said regarding different carriers:

"Was the transit interstate commerce? We agree with Counsel that it is unimportant in determining an answer whether the transit *'was by water or by railroad, or both water and railroad.'* "

In *General Oil Co. v. Crain* it was said on taxing *interstate* commerce:

To have the property at Memphis for distribu-

tion: . . . "Required that the property be given a locality in the state *beyond a mere halting* in its transportation."

"This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which *the protection* of *the state is necessary—a purpose outside of the mere transportation of the oil.* The case, therefore, comes under the principle announced in *American Steel & Wire Co. v. Speed,* 192 U. S. 500, 48 L. Ed. 538." (Italics ours.)

In the case at bar there was less delay, it was *"a mere halting in its transportation,"* to change carriers, as in the Sabine Tram case, 227 U. S. 111, where it was stopped 37 days at the seaboard.

In *Bacon v. Illinois,* the question was:

"Did the enforcement of the local tax upon the grain in the elevator of the Plaintiff in Error amount to an *unconstitutional interference* with *interstate* commerce."

Kelley v. Rhoades, 188 U. S. 1, reviews the other cases, and says:

"The law upon this subject, so far as it concerns *interference* with *interstate* commerce, is settled by several cases in this Court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an *indefinite time* during such transit, at least for *other than natural causes or lack of facilities for immediate transportation,* it may be lawfully assessed by the local authorities."

"Bearing in mind that the weight of all the previous cases in this Court has been laid upon the fact

of an *indefinite delay,* awaiting transportation at the commencement of the journey, or awaiting sale or delivery *at its termination,* the facts of this case fail completely to bring it within those authorities. The fact that the sheep may not have lost flesh, or may even have gained flesh, during their transit through the state, is impertinent, *unless the primary purpose* of their being driven there *was for grazing.*"

In *Gulf Ry. v. Texas,* 204 U. S. 403, it is said about title:

"It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed *by a transfer of title* during the transportation . . . The control over goods in process of transportation, *which may be repeatedly changed by sales,* is one thing; the *transportation* is another thing."

In *C., M. & St. P. Ry. v. Iowa,* 233 U. S. 334, the railway required the shipper, at a general distributing point, to unload coal which had come from Illinois, and reload it into the Company's cars so as to command a higher freight rate. The State Railway Commission stopped the practice, and this Court said:

"*The requirement was a reasonable one.* It cannot be said that the Plaintiff in Error had a constitutional right to burden trade by insisting that the commodities should be unloaded and reloaded in its own equipment."

The two cases cited under the Liability Law are: *Shanks v. Ry.,* 239 U. S. 556, and *C., B. & Q. Ry. v. Harrington,* 241 U. S. 177, which hold that work

remote from interstate commerce does not come within the Act, while work *close to it does. Loading* logs on cars is neither close or remote, but an *ESSENTIAL PART of commerce.* When 80 to 100 percent goes to other states, *the commerce is INTERSTATE,* and an employee loading cars is employed therein.

The dissenting opinion herein may have called for these citations. None sustain Defendant's position. Loading cars, and moving trains over a "Tap Line" railroad as part of the journey to other states, is *interstate commerce by railroad.* Plaintiff's case is within the letter and spirit of the Act. There is no more reason for denying its benefits to an employee of the "feeder" or "Tap Line" railroad, than to employees on the major railroads. Both carry the same freight, the latter in changed form. Bay's case comes within the meaning of the Liability Law, or the language used does not contain the ordinary meaning.

INUUSTRIAL INSURANCE — DEMURRER.

The affirmative defense quoted on page 6 of Defendant's brief was demurrable, and properly sustained. There was no exception or appeal taken, however, and the ruling stands as the law of the

case. This question was not raised in the Circuit Court of Appeals. If loading cars and taking the freight over a railroad on its way to other states is a part of interstate commerce, the Federal, not the State Industrial Insurance Act, applies. If any money was actually paid and received, Sec. 5 of the Federal Act governs. It reads:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

This language is broad enough to cover the instant case. The *State Act* provides a system of industrial insurance whereby injured workmen receive certain benefits. No doubt payments, if actually made under it, would be allowed by a jury under proper instructions, as a credit on any award made under the Federal Act, and should be pleaded as such. In any event, the defense is not complete as an estoppel or bar to the action. It does not show how much, *if any,* money Bay actually received, or

that his cause of action under the Federal Law is taken away except by inference. *The State cannot abolish the jurisdiction of the Federal Courts or deprive a litigant of rights granted by Act of Congress.* Had the demurrer been overruled, however, Bay might have a complete defense. His right to defend, if necessary, should not be cut off. When the trial court ruled in his favor on that point defendant appeared satisfied with the ruling or they would except and appeal. There is no estoppel to claim rights under the Federal Act.

"Since Congress, by the Act of April 22, 1908, took possession of the field of the Employers' Liability in interstate transportation by rail, all state laws upon the subject are superceded." *Seaboard Ry. v. Horton,* 233 U. S. 492.

CONCLUSION.

The plain and ultimate facts before the Court are: Washington is a timber state. In 1912, aside from the poles and shingles, more than four billion feet of lumber was cut in the State and 80 per cent. of this vast amount was marketed elsewhere. (Tr. 9.) It is beyond dispute; this lumber was the subject of interstate and foreign commerce. Defendant in error operated a common carrier railroad which carried this commerce to full capacity. It employed Plaintiff in Error, not logging in the woods, but loading

its cars with that commerce. Without the testimony of Bonner and Hanson the facts, with fair inferences, would justify a verdict that Bay was employed by Defendant in Error in interstate commerce. With their testimony, there is no place for conjecture, the conclusion is inevitable. That Defendant owned the logs is wholly immaterial. Title passes by bills of sale or other papers, which cannot move the cars. It is *the work of men* and vehicles that moves freight. Knowledge on the part of Defendant in error of the logs or poles destination is also irrelevant, as it could not change or affect the work. If otherwise, the Jury should find the facts. The local trade was a negligible quantity, the interstate trade the chief concern. Plaintiff should have the benefit of the Federal Act. His case comes squarely within it. The judgment of both courts should be reversed.

Respectfully submitted,

JOHN T. CASEY,

Attorney for Plaintiff in Error.

Charles R Pierce,
Of Counsel.

We call attention to Pennsylvania Ry. *vs.* Sonman Coal Co., No. 10, decided December 4, 1916, since briefs were written. It is there held:

> "The sale and delivery of coal F. O. B. cars at the mine for transportation to purchasers in other States is interstate commerce."

Also: Swift and Co. *vs.* United States, 196 U. S., 375, 396-400, where it is held, the purchase of cattle at stock yards, and again the sale of the dressed meats, is interstate commerce. It is there said:

> "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the *expectation* that they will end their transit, *after purchase* (as dressed meats) in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. * * * It is immaterial if the section also embraces domestic transactions."
>
> "The question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it." Opinion, 398-9.

In Ill. C. Ry. *vs.* La. R. Com., 236 U. S., 157-163, it is said:

> "When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. *The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved.*"

In Pa. Ry. *vs.* Clark Coal Co., 238 U. S., 456, 465-6, it is said:

> "In determining whether commerce is interstate or intrastate, regard must be had to its *essential character*. Mere billing, or the place at which title passes, is not determinative. If the *actual* movement is interstate, the power of Congress attaches to it."

The facts as admitted in the Bay case, No. 165 (Defendant's brief, page 5), and the stipulated facts in the McCluskey case, No. 166, bring both cases clearly within the rule of what interstate commerce is defined to be by the foregoing authorities.

In the Supreme Court of the United States

No. 165

October Term, 1916

AUGUST BAY,

Plaintiff in Error,

vs.

MERRILL & RING LOGGING COMPANY,

Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

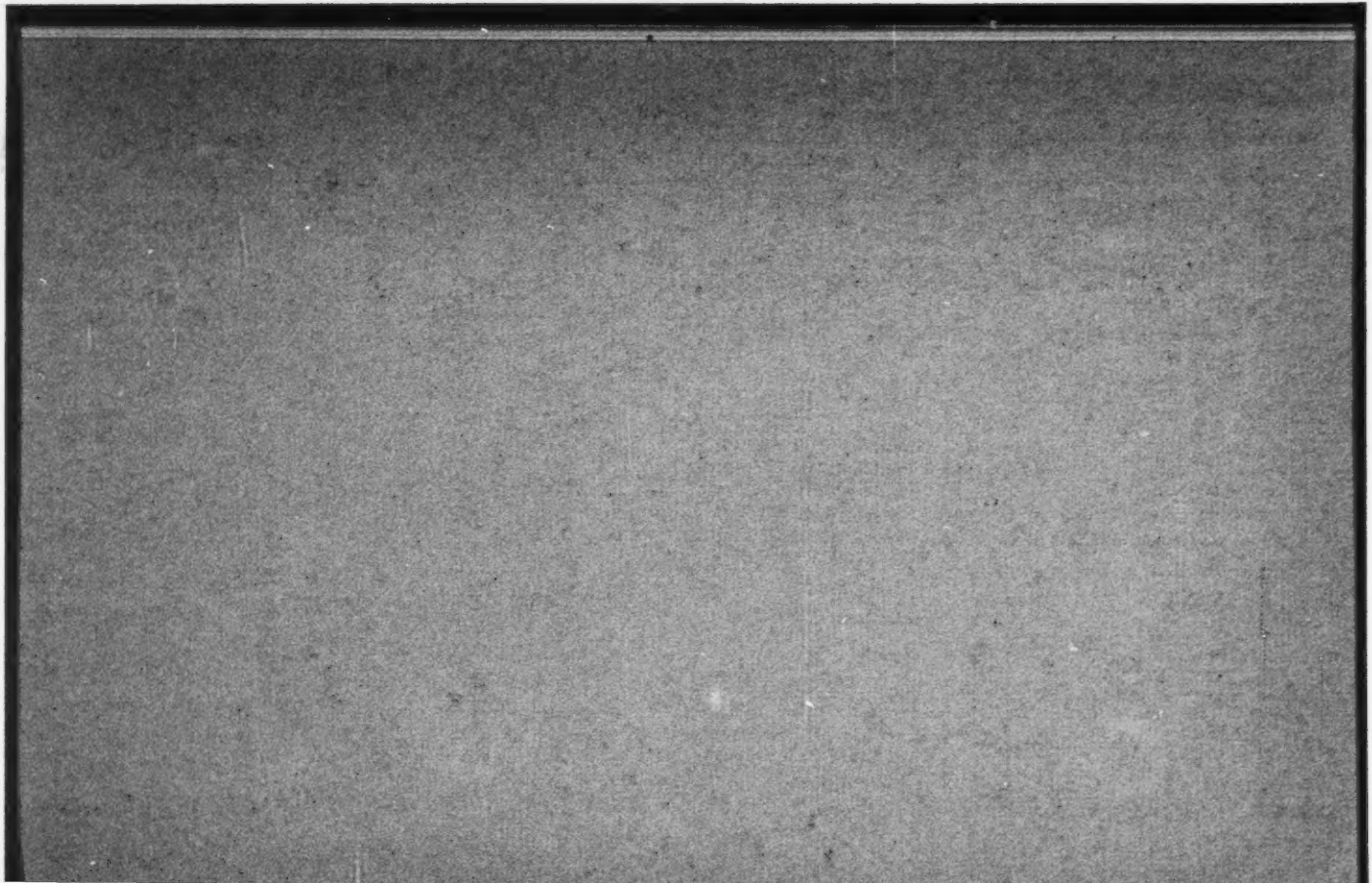
BRIEF OF DEFENDANT IN ERROR

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant in Error.

E. C. HUGHES,
Of Counsel.

660-671 Colman Building,
Seattle, Washington.

LOWMAN & HANFORD CO., SEATTLE



In the Supreme Court of the United States

No. 165

October Term, 1916

AUGUST BAY,

Plaintiff in Error,

vs.

MERRILL & RING LOGGING COMPANY,

Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DEFENDANT IN ERROR

In this case there is no diversity of citizenship between the parties. The jurisdiction of the Court is predicated upon the Liability Act of Congress of April 22, 1908, which, so far as here material, provides in Section 1:

> "That every common carrier by railroad, while engaging in commerce between any of the States * * * , shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."

It is, therefore, essential to the jurisdiction of this Court that, at the time of the injury to the plaintiff in error, the defendant in error was engaged in discharging the function of a common carrier by railroad, and that, while engaged in interstate commerce, the plaintiff in error was employed by it in such commerce.

I.

The defendant in error, by its charter, was authorized to conduct a general logging business; and it was likewise authorized to conduct a general railroad business as a common carrier. The latter function it had never performed. It owned and operated a logging road and was engaged only in logging its own timber, which it carried over this logging road and dumped into its logging boom on the shore of Puget Sound.

The status of a railroad such as this one is fixed by the real and actual scope of its operations, and the fact that it has reserved and unexercised powers of a common carrier will not make it such when it is acting outside the scope of the duty of a common carrier.

Santa Fe Ry. Co. v. Grant Bros., 228 U. S. 177.
Shade v. Northern Pacific Ry. Co., 206 Fed. 353.
Wade v. Lutcher & Moore Cypress Lbr. Co., 74 Fed. 517.

It may be true that so far as concerns the public rights the duties of a common carrier rest upon it.

That is not true, however, as between it and its employe, so long as the employment is in a strictly private service.

II.

Assuming, however, for the purpose of argument, that in the instant case defendant in error was engaged as a common carrier by railroad, yet there is no evidence in this case that the plaintiff in error was injured while he was employed by such carrier in interstate commerce; in other words, there are no facts in the record upon which the jurisdiction of this Court may be predicated.

Counsel for plaintiff in error, in his brief, seeks to uphold jurisdiction upon the testimony of one Hanson, which is as follows:

> "I am Manager of the National Pole Company, which buys poles from the Merrill & Ring Logging Company. We ship them by boat to California. We buy them in the woods along the line of defendant's railroad; that is, we buy the stumpage from the Merrill & Ring Company and handle the poles. They deliver them to us at their boom at the end of their road, where they are dumped off the cars into the water. From that place we crib them up and tow them to Everett. We buy and pay for them when they are delivered in the water, after which time the Merrill & Ring Company has nothing whatever to do with them." (Record, p. 11.)

This is all the evidence upon this particular subject. It discloses only an act of domestic commerce, beginning and ending within the State of

Washington. The Merrill & Ring Company cut the poles from its own land and sold and delivered them to the buyer at its boom in the waters of Puget Sound, at which time it received its pay from the purchaser. With the disposition the latter should make of them, it had nothing whatever to do and was in nowise concerned. It would be a far fetch indeed to hold such a transaction as one link in a continuous chain of interstate transportation, i. e., interstate commerce by railroad.

Even if the contention here made by plaintiff in error were meritorious, there is, however, no foundation for it in this case. Plaintiff in error testified:

> "At the time of the accident I was second loader, loading *logs* on cars." (Record, p. 11.)

It is not contended by plaintiff in error that the logs were sold to the National Pole Company. On the other hand, they are discussed in his brief under the title, "Saw Logs." They were sold to various companies operating saw mills in the city of Everett. Concerning them, Mr. Bonner testified:

> "I am Manager of the Weyerhauser Mill Company's plant at Everett. We have from time to time during the last two years bought quite a few logs from the Merrill & Ring Lumber Company. We get the logs which I buy from Merrill & Ring at their boom and tow them to our mill. We then saw the logs into lumber, which we sell. We market the larger part of our products, including the logs purchased from defendant, throughout the middle prairie states by rail; 15 or 20 per cent. of it in the State of Washington." (Record, p. 12.)

There is testimony of other witnesses corroborative of the above. There is nothing in the record to alter, change or modify it.

Briefly stated, the undisputed facts are these: The defendant in error owns timber lands and a railroad, which it employs in logging these lands and transporting its logs and poles to its boom in the waters of Puget Sound; and plaintiff in error was injured while employed in loading logs upon the logging cars. The logs were sold and delivered at the boom to various companies, which transport them with their own tugs to their respective mills and saw them into lumber. The lumber is then sold by the mill companies, about twenty per cent. to the domestic trade, and the balance is marketed throughout the middle prairie states by rail. It is upon these facts that the contention is here made that defendant in error was engaged in interstate commerce at the time plaintiff in error received his injuries. Were it not that a minority opinion was filed in the Circuit Court of Appeals, we would deem it unnecessary to further discuss the subject or to cite authorities.

It is, of course, well settled that the transportation of the commodities of commerce is itself commerce; but to constitute transportation interstate commerce, the particular act of transportation must be one link in a continuous and "final journey out of the State."

The Daniel Ball, 10 Wall. 557.
Coe v. Errol, 116 U. S. 517.

Diamond Match Co. v. Ontonagon, 188 U. S. 82.
Kelley v. Rhoads, 188 U. S. 1.
Gulf, Colo. & Santa Fe Ry. Co. v. Texas, 204 U. S. 403.
General Oil Co. v. Crain, 209 U. S. 211.
Bacon v. Illinois, 227 U. S. 504.
C. M. & St. P. Ry. Co. v. Iowa, 233 U. S. 334.
Shanks v. Delaware, Lack. & Western Ry., 239 U. S. 556, 558.
C. B. & Q. Ry. v. Harrington, 241 U. S. 177.

III.

The answer of defendant in error pleaded the Workmen's Compensation Act of the State of Washington and its compliance therewith, and alleges:

> "II. That this plaintiff has duly applied for and has regularly received compensation under and in pursuance of the terms of said Act out of the funds provided thereby, and for which the aforesaid premiums of this defendant were contributed and paid.
>
> III. That by the terms of said Act all civil actions and causes of action for such personal injuries as are described in plaintiff's complaint, and all jurisdiction of all courts of the State over such causes were abolished." (Record, p. 5.)

To this answer no reply was made, and it therefore stands admitted of record.

The plaintiff in error had the right to elect whether he would claim his right to recover under the State or the Federal Act. We respectfully submit that by his admitted action he has elected to

claim under the State law and should now be estopped from prosecuting a further action under the Federal Act.

Respectfully submitted,

E. C. HUGHES,
MAURICE McMICKEN,
OTTO B. RUPP,
H. J. RAMSEY,
Attorneys for Defendant in Error.

INDEX

LIST OF CASES CITED:

In the Supreme Court of the United States

AUGUST BAY, *Plaintiff in Error,*
vs.
MERRILL & RING LOGGING COMPANY, *Defendant in Error.*
NO. 165.

UPON WRIT OF ERROR FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action by August Bay, Plaintiff in Error, to recover damages from the Merrill & Ring Logging Co., Defendant in Error, for personal injuries received while loading logs on defendant's cars in the State of Washington.

PLEADINGS.

The complaint (Transcript 2-3) alleges a cause of action in negligence under the Employers' Liability Act of April 22, 1908.

The answer (Tr. 3-5) admits parts of the complaint, but puts in issue the questions of defendant's railroad being a "common carrier" or engaging in "interstate commerce." It is also set up affirmatively, that the accident comes under an Act of the State, not under the Federal Act. The same questions are raised as in the *Nordgard* case, No. 166.

A demurrer was sustained to the affirmative defense on the ground that the complaint alleged a cause of action under the Federal Act and the case was one to be tried thereunder.

EVIDENCE IN GENERAL.

The evidence shows that Defendant is a railroad and logging concern owning some twenty miles of standard gauge railroad, running from a point on Puget Sound through their own and other timber lands.

At the time Plaintiff was injured, Defendant was getting out logs and poles and dumping them in the water near Everett and Mukilteo. The poles were sold to the National Pole Company, taken down over defendant's railroad, then sent on cars and boats to California. The logs were sent over the railroad, taken to nearby mills and cut into lumber and shingles, 80 per cent of which was then

loaded on cars and boats and sent without the State.

Plaintiff was injured October 21, 1912. A log was dropped suddenly without the customary signal, and his leg crushed so that amputation became necessary.

At the close of Plaintiff's case, Defendant challenged the sufficiency of the evidence on the grounds:

First: That the testimony in this case does not establish that Defendant is a common carrier by rail; Second: That it is not engaged as a common carrier in interstate commerce; Third: That it does not establish that the Plaintiff at the time of injury was engaged in the service of a common carrier by rail in interstate commerce.

Thereupon the Court withdrew the case from the jury and dismissed the action.

The case was taken by writ of error to the Circuit Court of Appeals, where the judgment of the District Court was affirmed by a divided Court.

QUESTIONS INVOLVED.

The questions involved in this writ of error are:

1. Was the Defendant's railroad a common carrier?

2. Was the Defendant using its railroad, and employing Plaintiff in interstate commerce at the time he was injured?

3. When pleadings in a law case raise issues of fact, have the parties a right to a jury trial on such issues?

4. What act applies, State or Federal?

Negligence, and kindred questions, are not involved.

ASSIGNMENT OF ERRORS.

1. The Honorable Circuit Court of Appeals erred in affirming the judgment of the District Court in withdrawing the case from the jury and dismissing Plaintiff's action on the evidence, without a verdict on the issues raised in the pleadings.

EVIDENCE DETAILED.

The Articles of Incorporation of Merrill & Ring Logging Company (Exhibit "A"), among other things, provide:

ARTICLE II.

The purposes and objects for which the corporation is formed are:

Second: To carry on and conduct a general logging business in the State of Washington and in the Province of British Columbia.

Fifth: To carry on and conduct *a general railroad business as a common carrier* for hire of passengers and freight, and for that purpose to construct such railroads as well as rights of way, franchises, locomotives, cars, rollways, booming grounds, and any and all other facilities necessary or convenient in the carrying on or conducting of such logging railroad business; and for the purpose of carrying out any of the objects or purposes in this section set forth, to purchase or otherwise acquire any such railroad now constructed or operated in the State of Washington or in the Province of British Columbia, or hereafter so constructed in said state or said province, either by the purchase of the same outright or by the acquisition and ownership of all or any portion of the capital stock of such corporation.

Seventh: To build, construct, purchase, or otherwise acquire, equip, own, operate, maintain, sell

or otherwise transfer, tug-boats, tow-boats, or other steam or other power vessels, as well as scows, barges and other vessels and to carry on therewith a general towage and transportation business upon the waters of Puget Sound and of British Columbia and the tributaries thereof, and to construct, purchase or otherwise acquire, maintain and operate wharves, ware-houses, and other similar structures for the convenience of commerce and to carry on a general wharfage and warehouse business.

Ninth: To acquire by condemnation or other legal method authorized by the laws of the State of Washington or the Province of British Columbia rights of way for the purpose of carrying out any of the purposes and objects of this corporation, and *to exercise the right of eminent domain in either said state or in said province* as may now or hereafter be conferred upon this and like corporations.

ORAL TESTIMONY (Tr. 7-12.)

Timothy Jerome testified, *inter alia*, as follows:

I am Secretary of the Merrill & Ring Logging Company, the defendant in this case. That company has been engaged in operations under the articles of incorporation, a copy of which is here in evidence, marked Plaintiff's Exhibit "A." They have a standard gauge logging railroad there, having switching connections with the Everett-Seattle

Interurban Railway line and also with the Great Northern Railway line. The railroad comes down a canyon, passing by trestle over the Great Northern tracks out onto the dock, and dumps the logs into Puget Sound. We take out on an average of 200,000 feet a day; that is in the neighborhood of about 38 or 40 cars a day.

Our arrangement with the Mukilteo or Crown Lumber Company was to do all the cutting of their timber into logs, and the loading, hauling and delivery of those logs into Puget Sound for so much a thousand. Our logging road at the time ran up beyond that timber of theirs into our own timber.

Robert B. Allen testified, *inter alia*, as follows:

I am editor of the West Coast Lumber Journal, and am familiar with the government reports of the amount of lumber cut in the state of Washington during the year 1912, which was four billion ninety-nine million feet, as shown by government figures. The amount shipped out of the state by both rail and water is about 80 per cent.

Albert Miller testified, *inter alia*, as follows:

I worked as a brakeman on the logging railroads and boom man on the Sound for the defendant in this case, and am familiar with the trackage facilities and connections they have with other railroads. While I was working up there boats landed at the Sound terminus of the railroad which carried freight and passengers. We unloaded some freight from that boat which did not have the name of Merrill & Ring on it but some other name. The logs and poles were brought down from the woods in cars and thrown into the Sound; then they were rafted up, sold to different parties, sent to Everett and Mukilteo, and so on. I have occasionally passed the Weyerhauser and Everett mills and have seen

quite a bit of lumber from those mills going away by rail and some by steamship. One of the freight cars that I saw upon this line was loaded with short wood and one with slabs. I think at one time they had a boxcar loaded with castings, such as brake heads, brake shoes and brake wheels.

August Bay testified *inter alia* (Tr. 11), as follows:

I am the Plaintiff in this action. I was second loader, loading logs on cars. *The logs are brought down over the railroad, thrown into the waters of Puget Sound and then tugs come and take them away to Everett and Mukilteo.* They have a regular railroad over which they can run any kind of cars. I have seen Northern Pacific and Great Northern cars there. They are taken to the mill and cut, then loaded on the cars and boats and shipped all over the world, and all the lumber they load in the cars most of it goes back east and some to British Columbia, Canada. I have seen them loaded upon the cars at the different sawmills where Merrill & Ring's logs go, and on foreign boats—not tugs; the tugs haul the logs from Merrill & Ring's boom to Everett and to Mukilteo. The poles and piling that they bring down over this road—once I saw them loaded in a boat after they had been towed to Everett. The boats had foreign flags.

O. S. Hanson testified, *inter alia*, as follows:

I am manager of the National Pole Company, which buys poles from the Merrill & Ring Logging Company. We ship them by boat to California. We buy them in the woods along the line of defendants' railroad; that is, we buy the stumpage from the Merril & Ring Company and handle the poles. They deliver them to us at their boom at the end

of their road, where they are dumped off the cars into the water. From that place we crib them up and tow them to Everett. We buy and pay for them when they are delivered in the water, after which time the Merrill & Ring Company has nothing whatever to do with them.

W. H. Bonner testfiied, *inter alia*, as follows:

I am the manager of the Weyerhauser Mill Company's plant at Everett. We have from time to time during the last two years bought quite a few logs from the Merrill & Ring Lumber Company. We get the logs which I buy from Merrill & Ring at their boom and tow them to our mill. We then saw the logs into lumber which we sell. We market the larger part of our products, including the logs purchased from the Defendant, throughout the middle prairie states by rail, 15 or 20 per cent. of it in the State of Washington.

ARGUMENT AND AUTHORITIES.—COMMON CARRIER.

First: Was defendant's railroad a common carrier?

The District Court held it was not. The Circuit Court of Appeals assumed it was.

The trial Court concluded that a railroad of this character must be devoting a large part or all of its time in hauling freight for the public, and when hauling its own logs on its own railroad, is not a common carrier. This is error as to a corpotion *organized for public service.* An expressman

or other public carrier on the street or elsewhere, is a common carrier by virtue of public work. These logging railroads, are common carriers by virtue of the laws of their creation, which expressly declare them to be such, and the ordinary definition of the first does not apply to the second.

Defendant having admitted its Articles of Incorporation granting it the powers of a common carrier is in no position to dispute the question. The Circuit Court of Appeals was correct on this point.

Section 13 of the Washington State Constitution, among other things, provides:

"All railroad, canal and other transportation companies are declared to be *common carriers*, and subject to legislative control."

See also the following cases discussed in the Nordgard brief (No. 166):

United States v. Union Stock Yard Co. 226 U. S. 286.

Winona Ry. v. Blake, 94 U. S. 179.

State v. Superior Court, 62 Wash. 612.

State v. Superior Court, 47 Wash. 397-401.

State v. Superior Court, 48 Wash. 277.

State v. Superior Court, 56 Wash. 214.

In *Old Colony Trust Co. v. Omaha*, 230 *U. S.* 100, this Court held that Federal Courts are bound

by the State rule in the construction of State Constitutions and Statutes.

In the instant case, defendant's railroad is a common carrier, under the foregoing state decisions. We believe, however, the question is unimportant, if it was engaged in interstate commerce and employing Plaintiff therein when he was injured.

Section 7 of the Federal Act is as follows:

"That the term 'Common Carrier' as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

Persons and receivers, as well as corporations, are here made Common Carriers. Defendant's railroad was so organized. It claims and receives from the State the power of Eminent Domain and other privileges, and must assume the responsibilities attached thereto. It is very evident from the broad and general terms used by Congress in the enactment of the Liability law, that the *intent*, as held in *Colasurdo v. Ry.* 180 *Fed.* 832, was to include all railroad employees who *could* be included within its beneficient provisions.

In *United States v. La. Ry.* 234 *U. S.* 1, *supra*, it is held:

"The right of the public to use the facilities of a railroad, and to demand service of it, rather than the extent of its business, is the real criterion by which to determine whether or not it is a common carrier."

" 'Tap line' railroads connecting timber lands and lumber mills with trunk line railroads, although owned by the persons who also own the timber and mills which they principally serve, must be regarded as common carriers as well of the freight belonging to the owners of such tap lines as of nonproprietary traffic, and as such to be entitled to participate with such trunk line railroads in joint through rates, where such tap line roads are organized as common carriers under the state laws, are so treated by the public authorities of the state, are engaged in carrying for hire the goods of those who see fit to employ them, are authorized to exercise the right of eminent domain by the State of their incorporation, and are treated and dealt with as common carriers by connecting systems of other carriers."

It seems unnecessary to argue the "common carrier" question further. Defendant's railroad comes under the Liability Law if it was engaged in interstate commerce when plaintiff was injured.

INTERSTATE COMMERCE.

The commodities transported over defendant's railroad should be divided into two classes:

First: Poles and piling sold and delivered to the National Pole Company. *Second*: Saw logs

from which lumber and shingles were thereafter manufactured by the mills near defendant's boom waters.

POLES.

The case on the poles herein is stronger than in No. 166, where 60 *per cent.* went to California. In this case *all the poles* were sent there by boat or rail.

The Tap Line cases upon which the dissent of Justice Ross was based, seems to us conclusive that defendant's railroad was engaged in Interstate Commerce while hauling these poles to Puget Sound. The transit of interstate commerce cannot be cut up into sections. In this case it began on defendants' railroad. The poles were then started on their journey to California. Plaintiff's work loading them on defendants' cars was necessary to get the poles from the State of their origin to the state of destination. Defendants' railroad was just as essential as any other link in the interstate chain of transit. We can hardly see how two opinions on this point can be seriously entertained.

The Liability Law should not be construed out of use. The tendency of the lower courts at first was to limit its application, but the construction of this Court has always been liberal, in keeping with the plain object Congress had in its enactment.

SAW LOGS.

The testimony of Mr. Allen, shows that Washington is a timber and lumber state and markets 80 per cent. of its timber products in other states and countries. To this extent the timber and lumber produced in the State is a commodity of Interstate and Foreign Commerce.

If one large railroad owned defendant's "Tap Line" and was cutting logs in the State of Washington; then transporting them to saw mills on Puget Sound, then hauling the lumber and shingles to the prairie states, it would be admitted that hauling these logs to the mill was just as much a part of Interstate Commerce as hauling the lumber and shingles away from the mill to the prairie states.

Is it any less Interstate commerce because different parts of the work is divided among different corporations? The result is the same. Defendant, with the saw mills and other railroads, are taking logs from one state and furnishing the people of other states with lumber and shingles. The logs are merely "milled in transit" by a separate corporation, and were constantly on the move in interstate commerce from the time Plaintiff loaded them on defendant's cars until they

reached the farmers and others in the prairie states in changed form from logs to lumber. Any other view would allow transcontinental railroads to organize tap line railroads and mill companies to do parts of the work, and escape liability under the Federal Act. The work may be distributed among different corporations, as well as among men, without changing its interstate character.

In *United States v. Col. Ry.* 157 *Fed.* 321, construing the Safety Appliance Act, which is *in pari materia* with the Liability Law concerning Interstate Commerce, held:

"The Safety Appliance Acts . . . apply to and govern a railroad company engaged in interstate commerce, which operates entirely within a single state, independently of all other carriers."

See Opinion and cases cited, pp. 330-1, where it is said:

"It was the evident and declared purpose of the safety appliance acts to require every common carrier engaged in interstate commerce, and hence every common carrier so engaged independently in a single state, to comply with the requirements of the statute. No greater burden is thereby imposed upon a company engaged in such commerce within one state than upon one so engaged in more than one state. There was as urgent a demand, and as much reason and necessity, for the protection of the lives and limbs of the servants of railroad companies operating in a single state as of preserving the lives and limbs of the

servants of such companies operating across state lines. The safety appliance acts might be practically evaded and thus rendered futile if companies independently transporting articles of interstate commerce in single states could exempt themselves from these provisions by conducting all such transportation, except that across the imaginary lines which divide the states, by means of corporations operating in single states, only."

The Federal Act is broad and comprehensive in its terms and is the best guide to what it means. In its application none of its important provisions should be over-looked or nullified. It applies to all kinds of traffic which the word commerce implies. Interstate Commerce is defined in: *Mobile v. Kimball*, 102 U. S. 691; *Gibbons v. Ogden*, 22 U. S. 9, Wheat 189; *McCall v. People*, 136 U. S. 104.

"From the moment that an article of commerce commences to move from one state to another, it becomes a subject of interstate commerce, and, as such, is subject only to National Legislation, and not to the police power of the State." *Bennett v. Am. Ex. Co.* 23 *Am. St.* 774.

To the cases already cited we wish to refer the Court to the following cases analyzed in the Nordgard brief, which are in point:

Texas Ry. v. Sabine Tram. Co., 227 U. S. 112:

R. R. Com. v. Texas Ry. 229 *U. S.* 336:

No. Car. Ry. v. Zachary, 232 U. S. 248:

Ohio Com. v. Worthington, 225 *U. S.* 101:
Pederson v. Ry. 229 *U. S.* 146:
S. P. Ter. Co. v. I. C. C. 219 *U. S.* 498.

JURY TRIAL.

Where pleadings make issues of fact as plain as in this case, and oral testimony is presented to prove the issues, there is no justification for taking the case from the Jury. It is an absolute denial of the Jury Trial right. The *pleadings* herein presented issues of fact, and the testimony introduced, oral and documentary, proved or tended to prove those issues, and should have been submitted to the Jury and their verdict received. If the trial court was dissatisfied with the verdict, or believed there was little or no evidence on any essential point to support it, a new trial could be granted. That is the limit of the Court's jurisdiction, if the Constitutional right of jury trial under the 7th Amendment is preserved. The trial court had no right to follow the state practice, sometimes pursued arbitrarily, by deciding the weight of testimony himself, on issues raised in the pleadings, and granting a nonsuit and dismissal of the action. If so, the jury becomes merely "a useless appendage" in the trial of a lawsuit in a Federal Court.

It is only necessary to call the Court's attention to the recent case of *Slocum v. N. Y. Life Ins. Co.* 228 *U. S.* 364, and cases therein cited to show error on this point which requires a reversal.

FEDERAL ACT APPLIES.

The argument already made answers the Fourth and last question asked in the beginning of the brief. The Employees' Liability Act, not the State Act, applies. "That which is not supreme must yield to that which is." *Brown v. Maryland*, 12 Wheat 419-48.

Plaintiff was loading logs and poles on defendant's cars; the Defendant hauled them to Puget Sound where the "milling in transit" of the logs took place, and the product then transported to other states. *The poles were all sent direct to California.* This work of Defendant was a part of the interstate transit of freight, and Plaintiff was employed in this work. His case comes under the Federal Act, which supersedes all applicable state laws.

St. Louis Ry. v. Hesterly, 228 U. S. 702.
Missouri Ry. v. Wulf, 226 U. S. 570.

The Liability Law aims at doing justice in every particular. The affirmative defense to which

a demurrer was sustained by the Trial Court is not a defense in bar to the cause of action stated in the complaint. If Defendant made any contribution for Plaintiff's injuries, Sec. 5 of the Federal Act expressly gives credit for such payments, and the amount of any recovery is accordingly reduced.

The amount, if any, contributed by Defendant for Plaintiff's benefit under the State Law is a matter of proof, and might be a defense *pro-tanto*, not in bar. Defendant, however, cannot complain of the ruling in the District Court sustaining the demurrer as no appeal was taken therefrom.

Defendant's railroad being a common carrier, and being engaged in interstate commerce, and Plaintiff being employed in such commerce is entitled to the benefit of the Liability Act and to a jury trial on the issues of fact raised in the pleadings. The decisions of both Courts should be reversed and a new trial on the merits before a jury granted.

Respectfully submitted,
JOHN T. CASEY.
Attorney for Plaintiff in error.

Geo. F. Hannan
Chas. R. Pierce,
Of Counsel.

BAY *v.* MERRILL & RING LOGGING COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 165. Argued January 30, 31, 1917.—Decided March 6, 1917.

Upon a state of facts not substantially different from those presented in *McCluskey* v. *Marysville & Northern Railway Co.*, *ante*, 36, *Held*, that the defendant in error in hauling its logs from its own timberlands over its own railroad to tidewater (origin, destination and transit all being in the same State) for sale to others who subse-

quently disposed of them or their manufactured products partly in other States, was not engaged in interstate or foreign commerce, and that the injuries suffered by the plaintiff while loading logs upon one of defendant's cars were therefore not remediable under the Federal Employers' Liability Act.

220 Fed. Rep. 295, affirmed.

THE case is stated in the opinion.

Mr. John T. Casey, with whom *Mr. George F. Hannan* and *Mr. Chas. R. Pierce* were on the briefs, for plaintiff in error.

Mr. E. C. Hughes, with whom *Mr. Maurice McMicken*, *Mr. Otto B. Rupp* and *Mr. H. J. Ramsey* were on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is controlled by the decision in *McCluskey* v. *Marysville & Northern Railway Company*, just decided, *ante*, 36. As in that case, the suit was brought under the Federal Employers' Liability Act to recover damages for injuries suffered while Bay, the plaintiff in error, was employed by the defendant on its logging railroad. The accident which gave rise to his injuries occurred while he was engaged in loading on a flat car on defendant's timber land, logs which had been cut for carriage on the railroad to tidewater at Puget Sound. The case was tried by the same court which heard the *McCluskey Case*, there was a directed verdict for the defendant on the ground that the company was not engaged in interstate or foreign commerce when the accident occurred and the judgment thereupon entered dismissing the suit was affirmed by the court below on the authority of the *McCluskey Case*. 220 Fed. Rep. 295.

The facts were thus stated by the court below:

"The Logging Company owned extensive tracts of timber in Snohomish County, Washington, and was engaged solely in cutting logs on its own lands and hauling them over its own road to the waters of Puget Sound, where it dumped them from the cars into a boom. At that point it sold the logs to purchasers who paid for them there, and there took possession of them and towed them away by tugs. The most of the logs were sold to near-by mills on the Sound, which were engaged in the manufacture of lumber, and this lumber, when manufactured, was for the most part ultimately disposed of and shipped to points outside of the State of Washington. In addition to these transactions in logs, the Logging Company had at times taken out some poles, which also it sold and delivered at its boom to the National Pole Company, a purchaser which did business at Everett, and which bought and paid for the poles after they were delivered in the water, and thereafter sold them for shipment to California. The road is a standard gauge logging railroad, and is operated as a part of the logging business of the defendant in error, and is connected by switches with the Great Northern and the Interurban roads; but those connections are used only for the purpose of bringing supplies to the company's logging camps. No logs or timber of any kind were at any time transferred to these other roads. One shipment of steel rails had gone over the logging road for the Interurban at the time when the latter was constructing its road. For that service the actual expense of operating the locomotive was the only charge made, and the Interurban assumed all liability on account of accidents occurring in the transportation."

As these facts are not substantially different from those presented in the *McCluskey Case*, it follows that the reasoning and authorities by which the court below sustained its ruling in that case also demonstrate the correctness of its

conclusion that in this case at the time the injuries were suffered the defendant was not engaged in interstate or foreign commerce.

Affirmed.